

# TEN THOUSAND COMMANDMENTS

*An Annual Snapshot of the  
Federal Regulatory State*

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# Ten Thousand Commandments

## An Annual Snapshot of the Federal Regulatory State

2021 Edition

by Clyde Wayne Crews, Jr.

### Executive Summary

Now a relic, spending control and deficit restraint are indispensable to a nation's stability and long-term economic health. What little alarm arose over lack of spending restraint under President Donald Trump's administration, even with the benefit of a healthy economy, never stemmed disbursements.<sup>1</sup> Fiscal conservatives long ago lost the appetite for addressing spending.<sup>2</sup> Even before the rocketing spending generated by the coronavirus outbreak, spending on debt service threatened to rival the entire defense budget, especially as interest rates rise.<sup>3</sup> Meanwhile, COVID-19 has only escalated magical thinking that government outlays create wealth. Today's mantra is, "When you run out of other people's money, keep spending anyway."

This year, the Congressional Budget Office's January 2021 *Budget and Economic Outlook*, covering 2021 to 2031, shows discretionary, entitlement, and interest spending of \$6.552 trillion in FY 2020 (up from \$4.4 trillion last year), with an unprecedented COVID-induced deficit of \$3,132 trillion.<sup>4</sup> While

spending is projected to decline in the new 2021 fiscal year and for a short time beyond, the Congressional Budget Office puts outlays beyond the \$7 trillion level before the end of the decade. The national debt now stands at \$27.8 trillion.<sup>5</sup> It was slightly under \$20 trillion when Trump took office just over four years ago.

As imposing as all that is, the cost of government extends even beyond what Washington collects in taxes and the far greater amount it spends. Federal environmental, safety and health, and economic regulations and interventions affect the economy by hundreds of billions—even trillions—of dollars annually. This situation has been aggravated by COVID-19. Unlike on-budget spending, regulatory costs and burdens caused by government are largely obscured from public view and operate like a hidden tax.<sup>6</sup> As the least disciplined aspect of government activity, regulation can be appealing to lawmakers. Budgetary pressures can incentivize lawmakers to impose off-budget regulations on the private sector rather than add to

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unpopular deficit spending. A government child care or job training initiative could involve either increasing government spending or imposing new regulations that require businesses to provide those benefits. Just as firms generally pass the costs of some taxes along to consumers, some regulatory compliance costs and mandates borne by businesses will percolate throughout the economy, finding their way into consumer prices and workers' wages.<sup>7</sup>

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

One of the Trump administration's first directives was a memorandum to executive branch agencies titled "Regulatory Freeze Pending Review."<sup>8</sup> Presidents routinely take similar steps to review predecessors' pending actions and prioritize their own.<sup>9</sup> Biden proved no different, but he went further in singling out dozens of rules for review.<sup>10</sup> Regulations published in the *Federal Register* with effective dates preceding Biden's arrival would not be available to freeze but could still be overturned via Congress' use of the Congressional Review Act.<sup>11</sup> The Trump administration went further in issuing a series of actions related to general regulatory process reform, pursuing reform of the executive branch itself, and streamlining internal agency processes and timeliness of regulatory approvals. Some of Trump's executive actions during his term went the other way by imposing burdens; among them were trade restrictions, anti-dumping, "buy American" agendas, and more.<sup>12</sup> Nonetheless, the extensive executive actions aimed at liberalization were both broad-based and sector-specific to areas such as financial regulation, antiquities and national monuments, offshore resource

access, education, health care,<sup>13</sup> agricultural biotechnology, and more (see Box 1).

Since the federal government heavily influences society through regulation as well as spending, lawmakers should thoroughly track and disclose regulatory costs and perform periodic housecleaning. The limited cost-benefit analysis currently undertaken by agencies relies largely on agency self-reporting, covers only a fraction of rules, and omits vast categories of intervention.<sup>14</sup> Regulators can be reluctant to acknowledge when a rule's benefits do not justify its costs, particularly when explicitly encouraged to amplify benefits and downplay costs.<sup>15</sup> In fact, one could and should expect agencies to devise new and suspect categories of benefits to justify rulemaking when so incentivized.<sup>16</sup>

The regulatory impulse is largely driven by Congress' longstanding delegation of its lawmaking power to executive branch regulatory agencies, and by its overbroad assumption of lawmaking power over citizens' lives in the first instance. Addressing that situation effectively will require the restoration of Congress' duties and confines under Article I of the Constitution rather than mere administrative law reforms. That change could take the form of requiring congressional votes on significant or controversial agency rules before they become binding. Getting lawmakers on the record as supporting or opposing specific rules would help reestablish congressional accountability and affirm a principle of "no regulation without representation."<sup>17</sup>

Federal regulatory transparency report cards, similar to the presentation in *Ten Thousand Commandments*, could be issued each year to distill information for the public and policy makers about the scope of the regulatory state.<sup>18</sup> Scattered government and private data exist on the number of regulations issued by agencies and their costs and effects. Improving and compiling some of that information can shed light on the scope of the federal regulatory enterprise. That goal is central to the annual *Ten Thousand Commandments* report.

## Box I. Prominent Executive Actions on Regulatory Process Reform during Trump's Term

### 2017

- Presidential Memorandum, Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing, January 24, 2017.<sup>19</sup>
- Executive Order 13766, Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects, January 24, 2017.<sup>20</sup>
- Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, January 30, 2017.<sup>21</sup>
- Executive Order 13772, Core Principles for Regulating the United States Financial System, February 8, 2017.<sup>22</sup>
- Executive Order 13777, Enforcing the Regulatory Reform Agenda, February 24, 2017.<sup>23</sup>
- Executive Order 13781, Comprehensive Plan for Reorganizing the Executive Branch, March 13, 2017.<sup>24</sup>
- Executive Order 13789, Identifying and Reducing Tax Regulatory Burdens, April 21, 2017.<sup>25</sup>
- Executive Order 13790, Promoting Agriculture and Rural Prosperity in America, April 25, 2017.<sup>26</sup>
- Executive Order 13792, Review of Designations under the Antiquities Act, April 26, 2017.<sup>27</sup>
- Executive Order 13791, Enforcing Statutory Prohibitions on Federal Control of Education, April 26, 2017.<sup>28</sup>
- Executive Order 13795, Implementing an America-First Offshore Energy Strategy, April 28, 2017.<sup>29</sup>
- Executive Order 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, August 15, 2017.<sup>30</sup>
- Executive Order 13813, Promoting Healthcare Choice and Competition across the United States, October 12, 2017.<sup>31</sup>

### 2018

- Presidential Memorandum, Memorandum for the Secretary of the Interior: Supporting Broadband Tower Facilities in Rural America on Federal Properties Managed by the Department of the Interior, January 8, 2018.<sup>32</sup>
- Executive Order 13821, Streamlining and Expediting Requests to Locate Broadband Facilities in Rural America, January 8, 2018.<sup>33</sup>
- Presidential Memorandum, Promoting Domestic Manufacturing and Job Creation—Policies and Procedures Relating to Implementation of Air Quality Standards, April 12, 2018.<sup>34</sup>
- Executive Order 13847, Strengthening Retirement Security in America, August 31, 2018.<sup>35</sup>
- Presidential Memorandum, Promoting the Reliable Supply and Delivery of Water in the West, October 19, 2018.<sup>36</sup>
- Presidential Memorandum, Developing a Sustainable Spectrum Strategy for America's Future, October 30, 2018.<sup>37</sup>

### 2019

- Executive Order 13855, Promoting Active Management of America's Forests, Rangelands, and Other Federal Lands to Improve Conditions and Reduce Wildfire Risk, December 21, 2018.<sup>38</sup>
- Executive Order 13891, Promoting the Rule of Law through Improved Agency Guidance Documents, October 9, 2019.<sup>39</sup>
- Executive Order 13892, Promoting the Rule of Law through Transparency and Fairness in Civil Administrative Enforcement and Adjudication, October 9, 2019.<sup>40</sup>
- Executive Order 13879, Advancing American Kidney Health, July 10, 2019.<sup>41</sup>
- Executive Order 13878, Establishing a White House Council on Eliminating Regulatory Barriers to Affordable Housing, June 25, 2019.<sup>42</sup>
- Executive Order 13874, Modernizing the Regulatory Framework for Agricultural Biotechnology Products, June 11, 2019.<sup>43</sup>
- Executive Order 13868, Promoting Energy Infrastructure and Economic Growth, April 10, 2019.<sup>44</sup>

### 2020

- Executive Order 13969, Expanding Educational Opportunity through School Choice, December 28, 2020.<sup>45</sup>
- Executive Order 13914, Encouraging International Support for the Recovery and Use of Space Resources, April 6, 2020.<sup>46</sup>
- Executive Order 13924, Regulatory Relief to Support Economic Recovery, May 19, 2020.<sup>47</sup>
- Executive Order 13927, Accelerating the Nation's Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities, June 4, 2020.<sup>48</sup>
- Executive Order 13950, Combating Race and Sex Stereotyping, September 22, 2020.<sup>49</sup>
- Executive Order 13956, Modernizing America's Water Resource Management and Water Infrastructure, October 13, 2020.<sup>50</sup>
- Executive Order 13957, Creating Schedule F in the Excepted Service, October 21, 2020.<sup>51</sup>

### 2021

- Executive Order 13979, Ensuring Democratic Accountability in Agency Rulemaking, January 18, 2021.<sup>52</sup>
- Executive Order 13980, Protecting Americans from Overcriminalization through Regulatory Reform, January 18, 2021.<sup>53</sup>

The 2021 edition of *Ten Thousand Commandments* is the latest in an annual series that examines the scope of the federal regulatory state to help illustrate the need for measures like regulatory budgeting and ultimately congressional accountability. This report contains seven major elements:

1. A bulleted summary of highlights.
2. An overview bookending the ways the Trump administration attempted to stem the flow of regulations and roll back old ones.
3. A detailed discussion of Trump's own regulatory impulses—implemented, pending, and potential—that could undermine the legacy of his deregulatory effort.
4. An overview of the scope of the regulatory state, including a taxonomy of categories and instances of unmeasured costs of regulation and intervention, and depictions of its considerable size compared with federal budgetary components and gross domestic product.
5. An analysis of trends in the numbers of rules and regulations issued by agencies, based on information provided in the *Federal Register* and in “The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions.” This section also provides a brief survey of memoranda, notices, and other “regulatory dark matter,” and examines the results after four years of Trump's “one-in, two-out” process for new regulations and its limitations.
6. Recommendations for reform that emphasize disclosure and improving congressional accountability for rulemaking.
7. An appendix containing historical tables of regulatory trends over past decades.

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

- Apart from sector-specific executive orders and memoranda, the Trump

administration streamlined regulation in seven prominent ways :

- Elimination of 15 rules and one guidance document via the Congressional Review Act;
- Agency restraint in initiating large, significant rulemakings after delay or withdrawal of hundreds of Obama administration rules in the pipeline;
- Multipronged streamlining of permitting for pipelines, bridges, 5G broadband, rural broadband, and other infrastructure;
- Progress, albeit with declining marginal returns, on the presidential requirement that agencies eliminate at least two rules for every one issued;
- Steps toward addressing agency guidance documents and other sub-regulatory decrees;
- COVID-related waivers and streamlining of regulation; and
- Self-initiated “rules for rulemaking” from agencies under Trump.
- Bookending four years of “one-in, two-out” for federal regulations under former President Donald Trump as prescribed by his Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs,” the administration claimed the FY 2020 ratio was 3.2 to 1 (and 1.3 to 1 if only significant deregulatory actions were counted).
- *Agencies' stated priorities and “inventories” of rules were warning signs for Trump's deregulatory agenda all along.* While the Trump administration claimed to have met internal goals of implementing a “one-in, two-out” process for federal regulations and freezing costs, the longer horizon signaled agencies poised to reverse course and to issue substantially more regulatory actions than deregulatory ones. That impulse to regulation is unencumbered under Biden's new executive directives to agencies.
- *Major new regulation is Trump's own creation.* President Trump's regulatory streamlining was offset by his own actions and favorable comments or lobbying for regulatory intervention in the following areas:

- Antitrust
- Hospital and pharmaceutical price transparency mandates and price controls
- Speech and social media content regulation
- Privacy, encryption, and algorithm regulation
- Threats to privacy: amplified government databases, biometrics, and surveillance
- Online taxes
- Bipartisan large-scale infrastructure spending with regulatory effects
- Trade restrictions
- Farm bill and agricultural intervention
- Subsidies with regulatory effects
- Telecommunications interventions, including for 5G infrastructure
- Personal liberties incursions: health tracking, vaping, supplements, and firearms
- Financial regulation
- Industrial policy in frontier sectors, such as scientific research, artificial intelligence, and the creation of the Space Force
- Novel welfare and labor regulations
- COVID-related regulation as opposed to deregulation
- Given the limited available federal government data and reports, and contemporary studies—and the federal government’s failure to provide a regularly updated estimate of the aggregate costs of regulation—this report employs a placeholder estimate for regulatory compliance and economic effects of federal intervention of \$1.9 trillion annually. It does so for purposes of context and rudimentary comparison with federal spending and other economic metrics. This report also presents an outline of the vast sweep of intervention and policies for which costs are disregarded and unfathomed.
- Federal spending topped \$4 trillion in 2018, then surged to \$6.5 trillion in 2020 with COVID-related spending and bailout efforts. These federal outlays are projected to be \$5.76 trillion in FY 2021 (not counting new COVID spending packages added during the course of 2021). The burden of regulatory intervention is equivalent to 33 percent of these projected federal outlays.
- Regulatory costs of \$1.9 trillion amount to 9 percent of U.S. gross domestic product, which was estimated at \$21.17 trillion in 2020 by the Commerce Department’s Bureau of Economic Analysis.
- When regulatory costs are combined with the peak COVID federal outlays of \$6.552 trillion in 2020, the federal government’s share of the entire economy amounted to at least 40 percent (30 percent is the typical figure; state and local spending and regulation would add to that).
- If it were a country, U.S. regulation would be the world’s eighth-largest economy (not counting the United States itself), ranking behind Italy and ahead of Brazil.
- The regulatory hidden “tax” rivals federal individual and corporate income tax receipts combined, which totaled \$2.076 trillion in 2020 (\$1.812 trillion in individual income tax revenues and \$264 billion in corporate income tax revenues).
- Regulatory costs rival corporate pretax profits of \$2.237 trillion.
- If one assumed that all costs of federal regulation flowed all the way down to households, U.S. households would “pay” \$14,368 annually on average in a regulatory hidden tax. That amounts to 17 percent of the average pretax income of \$82,852 and 23 percent of the average expenditure budget of \$63,036. The regulatory “tax” exceeds every item in the household budget except housing. That means that an average American household “spends” more on embedded regulation than on health care, food, transportation, entertainment, apparel, services, or savings.
- Calendar year 2020 concluded with 3,353 final rules in the *Federal Register*, up from 2019’s 2,964 final rules, which was the lowest count since records began

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being kept in the 1970s and is the only ever tally below 3,000. (In the 1990s and early 2000s, rule counts regularly exceeded 4,000 annually.) An additional 202 Trump administration rules were added between New Year's Day and Inauguration Day 2021.

- During calendar year 2020, while agencies issued those 3,353 rules (some of them deregulatory), Congress enacted “only” 178 laws. Thus, agencies issued 19 rules for every law enacted by Congress. This “Unconstitutionality Index”—the ratio of regulations issued by agencies to laws passed by Congress and signed by the president—highlights the entrenched delegation of lawmaking power to unelected agency officials. The average ratio for the previous decade was 28.
- In 2017, Trump's first year, the *Federal Register* finished at 61,308 pages, the lowest count since 1993 and a 36 percent drop from President Barack Obama's 95,894 pages, which had been the highest level in history. The 2020 *Federal Register* tally rose to 86,356 pages, which is the second-highest count ever. However, Trump's rollbacks of rules—and historically there are still fewer rules overall—also necessarily add to rather than subtract from the *Register*.
- The Weidenbaum Center at Washington University in St. Louis and the George Washington University Regulatory Studies Center in Washington, D.C., jointly estimate that agencies spent \$88 billion in fiscal year 2020 to administer and police the federal regulatory state. This on-budget sum is in addition to compliance and economic burdens.
- At the end of calendar year 2020, 2,149 proposed rules had been published in the *Federal Register*, which was Trump's highest count. His 1,834 in 2017 is the all-time low. The only other count to occur below Trump's levels was Obama's 2,044 in 2009.
- In contrast to the 3,353 rules finalized in calendar year 2020, there is also the flow in the pipeline itself to consider. According to the fall 2020 Unified Agenda of Federal Regulatory and Deregulatory Actions, 69 federal departments, agencies, and commissions have 3,852 regulatory actions in the pipeline at various stages of implementation (recently completed, active, and long-term stages). Of the 3,852 rules, 653 were deemed “Deregulatory” via Trump's now-defunct Executive Order 13771, broken down as follows:
  - Of 2,636 rules in the active phase, 496 are deemed deregulatory.
  - Of 630 completed rules, 101 are deemed deregulatory.
  - Of 586 long-term rules, 56 are deemed deregulatory.
- Of the 3,852 regulations in the Agenda's pipeline (completed, active, and long-term stages), 261 are “economically significant” rules, which the federal government describes as having annual economic effects of \$100 million or more. Of those 261 rules, 36 were deemed deregulatory for purposes of Trump's now-cancelled Executive Order 13771 (14 at the completed stage, 20 at the active stage). Only two are at the planned long-term rule phase.
- Since 1993, when the first edition of *Ten Thousand Commandments* was published, agencies have issued 111,065 rules. Since the *Federal Register* first began itemizing them in 1976, 208,155 final rules have been issued.
- The Trump administration's spring and fall 2020 editions of the Unified Agenda of Regulatory and Deregulatory Actions contained a combined 97 completed “economically significant” rules (the counts were 70 in 2017, 35 in 2018, and 88 in 2019). The yearly average for Barack Obama's eight years was 69; George W. Bush's average over his term was 49. Trump's average was 72, but his Agendas are the first to contain rules expressly designated deregulatory. There were 21 of them in 2020.
- During calendar year 2020, the Government Accountability Office (GAO) issued 90 reports on “major” rules—a category similar to but broader than economically significant—as the Con-

gressional Review Act requires. In the first year of the Trump administration, the count was 49, the lowest ever. President George W. Bush's administration averaged 63 major rules annually in eight calendar years. President Obama's administration averaged 86. Obama's eight years accounted for 691 major rules, compared with Bush's 504. Trump's four-year total was 274 for an average of 69, but a significant portion were deemed deregulatory. (These tallies emphasize calendar year, and therefore ignore pre-inauguration days attributable to a predecessor in transition years.)

- Of the 3,852 regulations in the pipeline, 635 affect small businesses. Of those, 330 required a regulatory flexibility analysis (an official assessment of small-business impacts), down from 412 in 2016 before Trump took office. An additional 285 were otherwise noted by agencies to affect small businesses in some fashion. Overall, 83 rules affecting small business were deemed "deregulatory" compared with 102 a year earlier.
- The five most active rule-producing executive branch entities—the Departments of Commerce, Health and Human Services, the Interior, Transportation, and the Treasury—account for 1,563 rules, or 41 percent of all rules in the Unified Agenda pipeline. The top five most active independent agencies account for another 341 rules.

- President Trump issued 69 executive orders in 2020 (after 47 in 2017, 35 in 2018, and 63 in 2019). From the nation's founding through the Obama administration, more than 15,285 executive orders had been issued. President Obama issued a total of 276, similar to President George W. Bush's 291. Before the 20th century, most presidents had issued no more than a few dozen. In contrast, Woodrow Wilson issued 1,803, Calvin Coolidge issued 1,204, and Franklin D. Roosevelt issued 3,467.
- President Trump issued 59 presidential memoranda that appeared in the *Federal Register* in 2020, after 26 in 2017, 30 in 2018, and 38 in 2019. During the eight calendar years encompassing President George W. Bush's presidency, 131 memoranda were published in the *Federal Register*, whereas President Obama's eight years saw 257 published. The *Federal Register* is not a complete compendium of executive actions, however.
- Public notices in the *Federal Register* normally exceed 24,000 annually, with uncounted guidance documents and other proclamations with potential regulatory effect among them (moreover, other guidance documents are issued that do not appear in the *Register* at all). In 2020, 22,480 notices were issued. There have been 638,935 public notices since 1994 and well over a million since the 1970s.



# 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.<sup>54</sup> Since that order has now been revoked by President Joe Biden, this edition of *Ten Thousand Commandments* bookends the Trump era.

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<sup>55</sup> 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.<sup>56</sup> 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.<sup>57</sup> Donald Trump, too, used the pen and phone, in significant part to attempt to undo Obama programs and otherwise streamline regulation.<sup>58</sup> 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.<sup>59</sup> Even the Trump executive branch reorganization initiative, undertaken alongside regulatory streamlining, did not result in the elimination of any regulatory agencies.<sup>60</sup>

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.<sup>61</sup> A poor record in court for many Trump streamlining measures has been widely noted.<sup>62</sup> 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,<sup>63</sup> and methane emissions at oil and gas operations on federal lands.<sup>64</sup> 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.<sup>65</sup> 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.

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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.<sup>66</sup> 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.<sup>67</sup> In any event, barring congressional action to streamline, a rule cannot be eliminated, but only replaced with a new rule.<sup>68</sup> 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."<sup>69</sup>

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.<sup>70</sup> 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."<sup>71</sup> 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."<sup>72</sup>

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."<sup>73</sup> The big changes—like recodification of the Waters of the United States<sup>74</sup> and Clean Power Plan rules,<sup>75</sup> or the Department of Energy's creation of a new product class for dishwashers<sup>76</sup>—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.

Curiously, while some claimed that Trump's rollbacks were illegal and undermined health and safety safeguards,<sup>77</sup> others called Trump's boasts a "deregulation myth."<sup>78</sup> Complaints, sometimes contradictory, range from the dismissive observation that the administration "claims credit for some regulatory actions begun under Obama"<sup>79</sup> to the claim that Trump merely wants to offload red tape from the private sector on to the government.<sup>80</sup> So Trump both overreached and accomplished nothing.<sup>81</sup> 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."<sup>82</sup> Although many of Trump's rules were unambiguously regulatory in nature, a distinction might be

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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.<sup>83</sup>

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.<sup>84</sup> 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.<sup>85</sup> 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.<sup>86</sup>

Some of the Trump midnight rules might temporarily constrain Biden and successors from wholesale rollback of the former president's legacy.<sup>87</sup> But what is likely to unfold is the undoing of Trump's streamlining by Biden's executive actions,<sup>88</sup> by agency personnel resistance,<sup>89</sup> and by corporations seeking to make strategic peace with re-regulation.<sup>90</sup> In 2021, finalized but unpublished Trump rules will have been scrapped and implementation delayed of those published but not yet effective.<sup>91</sup> 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.<sup>92</sup>

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

Executive Order 13771 can be appreciated as encapsulating how a president may *not* reduce the size of government unilaterally.<sup>97</sup> 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:<sup>98</sup>

**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.<sup>99</sup> 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.<sup>100</sup> 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:<sup>101</sup>

- 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.<sup>102</sup> 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.<sup>103</sup> 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),<sup>104</sup> and some elements, with caveats, of the 2019 Trump budget proposal addressing infrastructure reform.<sup>105</sup> 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”<sup>106</sup> and a September 2020 declaration regarding critical minerals and foreign threat also aimed at speeding mining permits.<sup>107</sup>

**Fourth**, the Trump administration technically exceeded its “one-in, two-out” goals for adoption of significant regulatory actions in each fiscal year,<sup>108</sup> but the increasing difficulty of achieving rule offsets was apparent from the beginning.<sup>109</sup> In implementing the streamlining process, two OMB guidance documents on the one-in, two-out executive order were issued after the order itself.<sup>110</sup> Further, another 2017 executive order established Regulatory Reform Task Forces at various agencies.<sup>111</sup> Agencies also sought public input on rule streamlining.<sup>112</sup> 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.”<sup>113</sup> 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.<sup>114</sup> (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.<sup>115</sup> 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.<sup>116</sup>

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,<sup>117</sup> a Securities and Exchange

Table I. 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,<sup>118</sup> and an FCC broadband privacy regulation.<sup>119</sup> The FCC's elimination of Obama-era net neutrality rules<sup>120</sup> and modernization of broadcast ownership rules<sup>121</sup> 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.<sup>122</sup> Fifty-seven of these deregulatory actions were deemed significant, so comparing significant deregulatory with significant regulatory actions yielded a four-to-one ratio.<sup>123</sup>

**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.<sup>124</sup> Sixty-one deregulatory actions were significant, so comparing significant deregulatory apples with significant regulatory apples yielded a ratio of 1.7 to 1.<sup>125</sup>

**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.<sup>126</sup> 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.<sup>127</sup> (The administration described its accounting methodology in “Accounting Methods under Executive Order 13771.”<sup>128</sup>) 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.<sup>129</sup> 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*.”<sup>130</sup> 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

	<b>Deregulatory Actions</b>	<b>Regulatory Actions</b>	<b>Present Value Savings</b>
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
<b>TOTAL</b>	<b>145</b>	<b>45</b>	<b>\$(144,026.1)</b>

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,<sup>131</sup> and of charges of "taking exaggerated credit for small reductions."<sup>132</sup> 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.”<sup>133</sup>

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.<sup>134</sup> The individualized yearly annual reports depict less, about \$189 billion, but are presented below with links to detail.<sup>135</sup>

FY 2017 savings: \$8.148 billion<sup>136</sup>  
FY 2018 savings: \$23.432 billion<sup>137</sup>  
FY 2019 savings: \$13.471 billion<sup>138</sup>  
FY 2020 savings: \$144.0 billion<sup>139</sup>  
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.<sup>140</sup>

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.”<sup>141</sup>

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.<sup>142</sup> 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:<sup>143</sup>

- 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.”<sup>144</sup>
- A great number of Environmental Protection Agency regulations.<sup>145</sup> 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,<sup>146</sup> an EPA-proposed rule on “strengthening transparency” and limitations on “secret science”<sup>147</sup> (vacated days after the Biden administration entered the White House,<sup>148</sup> and an EPA rule, “Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rule-making Process.”<sup>149</sup>
- 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.<sup>150</sup>
- A final rule issued by the White House Council on Environmental Quality modernizing the implementing regulations of the 1978 National Environmental Policy Act (NEPA) with respect to environmental reviews of infrastructure projects.<sup>151</sup>
- 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.<sup>152</sup>

- 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.<sup>153</sup>

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<sup>154</sup> and distilled spirits;<sup>155</sup>
- Modernization of authorizations for supersonic flights;<sup>156</sup>
- Lessening of restrictions on logging in federal forests put in place during the Clinton administration;<sup>157</sup> 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.<sup>158</sup>

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.<sup>159</sup>

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 “reg-

ulatory dark matter” that can have regulatory effect.<sup>160</sup> The most prominent pre-Trump move was President George W. Bush’s Executive Order 13422, which subjected significant guidance to OMB review,<sup>161</sup> and his administration’s 2007 OMB Good Guidance Practices memorandum.<sup>162</sup> Trump’s initial directives encompassed not just “significant regulatory actions,” but also significant guidance on a case-by-case basis.<sup>163</sup> Agencies at the time also revoked guidance documents and directives that were not included among the proclaimed regulatory reductions noted above.<sup>164</sup> 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.”<sup>165</sup> 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.<sup>166</sup>

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<sup>167</sup>
- Executive Order 13892, Promoting the Rule of Law through Transparency and Fairness in Civil Administrative Enforcement and Adjudication<sup>168</sup>

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.<sup>169</sup> 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.<sup>170</sup> 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.<sup>171</sup> 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.<sup>172</sup>

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.<sup>173</sup> Agencies already had ample ways to undermine Trump’s guidance program deliberately or simply through neglect before Biden torpedoed the program.<sup>174</sup>

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.”<sup>175</sup> The bipartisan Administrative Conference of the United States differs on that score,<sup>176</sup> 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.<sup>177</sup> 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.<sup>178</sup>

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.<sup>179</sup> 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.<sup>180</sup> Many reforms related to health care and transportation.<sup>181</sup> 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<sup>182</sup> Over 800—largely temporary—waivers were issued at federal and state levels,<sup>183</sup> 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.<sup>184</sup>

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.<sup>185</sup> 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.”<sup>186</sup>

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:<sup>187</sup>

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 re-emerge 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*.<sup>188</sup> 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.<sup>189</sup>

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.<sup>190</sup> In addition, retrospective review and sunseting 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.<sup>191</sup>

The Department of Transportation<sup>192</sup> and the Environmental Protection Agency maintained their own running online tallies to provide up-to-date public information on paperwork and deregulatory actions.<sup>193</sup> 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.<sup>194</sup> 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.<sup>195</sup> 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.

# Swamp Things—Trump’s Discordant Regulatory Impulses Offset His Deregulatory Successes and Expanded the Administrative State

President Trump attempted to prune rules and costs and held down regulatory output with more enthusiasm than other presidents. But Trump also added regulation.

A president is limited in the ability to unilaterally roll back much of the administrative state. Increases in regulation are propelled as if by autopilot, driven by sweeping legislation that delegates enormous power to agencies.<sup>196</sup> Agencies always answer the question “Is there call for regulation?” in the affirmative. This ratcheting upward of federal administration—with rare retrenchment apart from the aborted Trump effort—is endemic of institutionalized social-policy spending and regulation, the cost of which is rarely measured beyond the purely budgetary element.<sup>197</sup>

On the flipside of Trump’s regulatory savings, the former president’s own regulatory impulses derailed and even eclipsed the roll-back agenda.<sup>198</sup> Not every Trump executive order reduced regulatory intervention; many opened the door to it. Trump’s proclivity for trade restrictions and his zeal for antitrust and media regulation (such as swipes at Amazon and the AT&T–Time Warner merger) were apparent early.<sup>199</sup>

Trump’s one-in, two-out and net-zero “regulatory budget” notwithstanding, more burdens may have been added than subtracted with regard to the broader federal administrative state. Just as some streamlining of regulatory action does not appear in the *Federal Register*, the kinds of interventions put in play in the Trump years and in 2020’s pandemic scenario may not show up immediately or lend themselves to measurability.

Notably, on October 17, 2018, the day the 2018 fiscal year two-for-one update was released, Trump held an Oval Office meeting on regulations and the economy with several industry-specific workers and cabinet officials, where he said, “We’ve removed more regulations, and we will continue to get rid of regulations.” But then, in a little-noted remark, Trump said, “I think within a period of about another year, we will have just about everything that we’ve wanted.”<sup>200</sup> Yet there was much that remained to be done regarding comprehensive regulatory reform, and there was some backtracking as well.

Many less well-known regulatory initiatives emerged during the Trump tenure, such as the president’s approval of a permanent reauthorization of the Land and Water Conservation Fund (LWCF) boosting federal purchases of private lands,<sup>201</sup> his boasting of “the largest public lands package in a decade, designating 1.3 million acres ... of new wilderness,”<sup>202</sup> and his signing in 2020 of the Great American Outdoors Act, which allocates funding to the LWCF for a federal government that already owns a large portion of the continent. “From an environmental standpoint and from just the beauty of our country standpoint, there hasn’t been anything like this since Teddy Roosevelt, I suspect,” Trump said.<sup>203</sup>

In a related discordant move, the Trump administration received criticism from environmental groups over its expansions of drilling leases and rights on public lands and in the Arctic.<sup>204</sup> Conflicting with that move was Trump’s presidential memorandum placing a moratorium on oil and gas drilling and offshore windmill operations off the Gulf and Atlantic coasts of Florida and the other

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*Agencies always answer the question “Is there call for regulation?” in the affirmative.*

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southeastern Atlantic states.<sup>205</sup> Trump reiterated after his ban at an Ocala, Florida, rally that “Florida didn’t want to see sludge coming onto their beaches.”<sup>206</sup>

Among the bigger complications for any streamlining agenda is that one cannot get rid of regulations; at best, one can generally replace a rule with another rule.<sup>207</sup> As former OIRA Administrator Susan Dudley (now director of the George Washington University Regulatory Studies Center) pointed out:

For significant regulations, agencies must develop a legal and factual record to support the action, engage in interagency review led by OMB, seek public comment on the revisions, and justify the final action with information in the record.<sup>208</sup>

The careerist-dominated nature of the administrative state does not give any president much time, yet there is much on the books that a president can address unilaterally. Even less fortunate, Trump’s own regulatory impulses became dominant over his streamlining agenda, particularly where he exhibited solidarity with regulatory advocates on issues such as antitrust policy, regulatory action against high-tech firms and traditional media companies, and industrial and social policy.<sup>209</sup> What follows are areas where the administration added regulation or aggressively signaled support for intervention. This section will conclude with observations about rules with ambiguous effect and the complexities those present in streamlining bureaucracy.

**Antitrust.** On the one hand, the Trump administration took steps to cut merger review times overall and to speed up bank merger approvals via internal streamlining at the Federal Reserve and Comptroller of the Currency.<sup>210</sup> But on the other hand, President Trump casually invoked antitrust action against media, tech, and telecom firms, striking a discordant note with the deregulatory agenda. A hint of what was to come occurred when candidate Trump proclaimed, “AT&T is buying Time Warner, a deal that we will not approve in my administration . . . because it is too much

concentration of power in the hands of too few. . . . We will look at breaking that deal up and other deals like it.”<sup>211</sup> The Justice Department’s attempt to block the merger ultimately failed.<sup>212</sup> Similarly, Trump tweeted accusations in 2018 that Comcast may have violated antitrust laws.<sup>213</sup> However, after mulling it over (such delay is itself a regulatory cost), the Justice Department did not investigate the Comcast-NBCUniversal alliance.<sup>214</sup> The former president declared Google, Facebook, and Amazon to be potentially in a “very antitrust situation,”<sup>215</sup> and asserted he was “in charge” and “looking at it,”<sup>216</sup> at a time when politicians and pundits across the political spectrum have called for the breakup of those companies.<sup>217</sup>

In early 2019, the Federal Trade Commission (FTC) announced a “technology task force” to assess alleged antitrust violations in the tech sector and increase scrutiny of acquisitions.<sup>218</sup> In the wake of that, and in contrast to the administration’s recognition of the misuse of guidance elsewhere, the FTC issued guidance on how the antitrust laws should apply to the technology sector and defended its own role in policing it.<sup>219</sup>

In other antitrust developments, authorities have considered an injunction against Facebook’s procedures for interoperability across platforms<sup>220</sup> and its acquisitions.<sup>221</sup> And much of the antitrust pursuit against big tech has fused with the desire to regulate the platforms’ treatment of content. The FTC is also investigating Amazon, having started interviews in 2019 with businesses that sell on the site.<sup>222</sup> Other signals pointed to a potential antitrust agenda by the Department of Justice and FTC beyond big Internet firms.<sup>223</sup> The FTC, for example, began a challenge to an acquisition transaction in DNA sequencing,<sup>224</sup> and the Justice Department investigated alleged coordinated meat price increases.<sup>225</sup> At least some of these initiatives can be expected to continue under the Biden administration.

**Hospital and pharmaceutical price transparency mandates and price controls.** Reform legislation affecting the Food and Drug

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Administration (FDA), known as “right to try,” has expanded the public’s access to certain needed medications,<sup>226</sup> and the lifting of regulatory burdens expanded access to medicines and telemedicine during the COVID outbreak. However, the COVID-related regulatory pullbacks were modest and limited in scope, particularly when compared with Congress’s offsetting intervention.<sup>227</sup>

Worse, the Trump administration sought to bring the down the costs of prescription drugs using blunt tools like price controls and other mandates. This began in late 2016, when Trump, before his inauguration, accused the pharmaceutical companies of “getting away with murder” and expressed support of government drug-price negotiation.<sup>228</sup> The administration that year introduced a proposal to require pharmaceutical price-listing mandates in television advertisements.<sup>229</sup> A federal judge blocked the subsequent rule from the Department of Health and Human Services.<sup>230</sup> Demonstrating Trump’s own contention that regulation drags down markets, the drugmakers’ shares rose upon the blocking of the rule.<sup>231</sup>

Some Republicans in the U.S. Senate proposed price controls through the tying of U.S. drug prices to lower prices charged in some other countries,<sup>232</sup> which would affect availability and medication research and innovation.<sup>233</sup> Trump was reported to support the idea in the wake of the judicial rejection of compelled TV ad listings.<sup>234</sup>

The former president issued an executive order in mid-2019 on hospital price transparency that, while it expanded Health Savings Accounts and Flexible Spending Accounts, included negotiated rates for services and shoppable items.<sup>235</sup> This presaged finalization of a rule in November 2019 about which the president boasted, “Under the new price transparency rule ... hospitals will soon be required to publish the price of everything from individual medical supplies to the total cost of common procedures.”<sup>236</sup>

In 2020, Trump set insulin and injectable epinephrine price caps under Executive Order

13937, “Access to Affordable Life-Saving Medications,” pegging them to the price paid by Federally Qualified Health Centers.<sup>237</sup> September 13, 2020, brought Executive Order 13948 on “Lowering Drug Prices by Putting America First,”<sup>238</sup> to the ongoing consternation of pharmaceutical industry leaders.<sup>239</sup>

**Speech and social media content regulation.** Trump and many on the left agree in supporting regulation of social media search and speech, although each camp has its own reasons for it, so the issue remains alive in 2021, especially after Trump’s own removal from social media.<sup>240</sup> When Trump economic adviser Lawrence Kudlow was asked in the summer of 2018 about the administration’s openness to regulating Google search results, his response was: “We’ll let you know. ... We’re taking a look at it.”<sup>241</sup> As a private entity, the search results Google offers up represent free speech of Google’s own. In that respect, Facebook, Google, Twitter, and other private platforms cannot censor; only governments can do that.<sup>242</sup> But the matter escalated under Trump.

Early in his term, Trump had raged and tweeted extensively about media censorship, and not just of the social media variety.<sup>243</sup> A look at that offers some context for where we are now in 2021. At one point in 2017, candidate Trump even threatened NBC’s broadcast license,<sup>244</sup> and in June 2018 called for a boycott of AT&T over CNN’s coverage of himself.<sup>245</sup>

Asked at a November 7, 2018, press conference if he would regulate social media companies, Trump said: “I would do that. Yeah. I would look at that very seriously. I think it’s a serious problem. At the same time, you start getting into speech; that’s a very dangerous problem. That could be the beginning. So it’s very dangerous. ... And when you start regulating, a lot of bad things can happen. But I would certainly talk to the Democrats if they want to do that. And I think they do want to do that.”<sup>246</sup> And in June 2019, Trump said he was “all in” for a “no brainer” constitutional amendment proposed by Sen. Steve Daines (R-MT) to ban burning of the American flag.<sup>247</sup>

In May 2019, the Trump administration set up a tattletale Tech Bias Story Sharing Tool—which was quickly discontinued—for members of the public to report to the White House allegations of online bias and censorship, such as account suspension or termination.<sup>248</sup> That was followed by a July 11, 2019, White House Social Media Summit featuring a number of right-of-center personalities.<sup>249</sup>

After considering the matter in 2019,<sup>250</sup> the Trump White House in 2020 issued an executive order to combat alleged anti-conservative social media bias.<sup>251</sup> This move occurred in an environment in which both conservatives and progressives were calling for changes to the regulatory environment of social media and big tech, specifically online platforms' accountability for user-generated content, which is governed by Section 230 of the Communications Decency Act. The Trump Justice Department also weighed in with legislative proposals to change Section 230.<sup>252</sup> These efforts are likely to backfire on conservatives who accuse online companies of being biased against them.<sup>253</sup>

Under Section 230, users—not online media companies like Facebook or YouTube—can be held liable for content posted on the companies' platforms. That has allowed the flourishing of a vibrant online market of ideas. Watering down Section 230's protections would threaten that vibrancy, since it would incentivize companies to monitor the content posted on their platforms. That could result in less content overall, and much less airing of unpopular views online.

An FCC investigation into narrowing the scope of protections for tech companies under Section 230—in response to a petition from the Trump administration in July 2020—never materialized into a rule.<sup>254</sup> In December 2020, Congress voted to override Trump's veto of the National Defense Authorization Act, which he had exercised in part because it failed to eliminate the Section 230 protections that he claimed give “unlimited power to Big Tech companies.”<sup>255</sup> Following Trump's exit, this fight is still ongoing.<sup>256</sup>

***Privacy, encryption, and algorithm regulation.*** Regulations aimed at social media during the Trump era went beyond market-power and speech concerns. In July 2019, the Federal Trade Commission approved a record-level fine against Facebook for alleged privacy violations involving consulting firm Cambridge Analytica's gaining improper access to user data.<sup>257</sup> While abuses merit punishment, the agreement could result in very close regulatory supervision of the company that could set precedent.<sup>258</sup>

Another major but much smaller privacy settlement was that of the FTC with YouTube over the video streaming service's collection of children's information without parents' consent. Illegal behavior and violation of contract need to be addressed, but overzealous responses can flop, as well as affect firms that have not misbehaved. As former FTC chief technologist Neil Chilson noted on Twitter: “The FTC has shifted in a way that will require platforms to police user-generated content more heavily. This is an incremental change for big platforms who already have large staffs to review content; it is a much bigger deal for small players.”<sup>259</sup>

Then in December 2020, the FTC announced a major investigation into the “privacy and data collection practices of major tech firms,” including Facebook, Amazon, YouTube, and Twitter.<sup>260</sup> According to *Axios*, “In launching the study [proposed by a Republican FTC commissioner a year earlier], the FTC is using its authority to do wide-ranging studies for no specific law enforcement purpose.”<sup>261</sup>

Other Trump administration proposals to extend regulation in the areas of technology and privacy include the following:

- High-level security officials in the Trump administration sought to bar encryption that law enforcement cannot circumvent.<sup>262</sup>
- The FTC has discussed in hearings concerns regarding algorithms that share user data in behind-the-scenes “auctions” that influence the advertisements viewers see.<sup>263</sup>

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***Overzealous responses can flop, as well as affect firms that have not misbehaved.***

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**The government's  
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- The FTC hosted a workshop to “examine consumer protection issues related to video game ‘loot boxes,’ in-game rewards players can buy while playing a video game.” This agency’s efforts dovetailed with those of some legislators, who are inclined to treat phone-centered lifestyles and video gaming as “addiction” and to elevate government-as-parent in response.<sup>264</sup>

***Anti-privacy: amplified government databases, biometrics, and surveillance.*** The government’s overenthusiasm for surveillance is itself a major form of regulation. Consider the following examples.

In 2019, the Trump White House put forward proposals to respond to threats of gun violence, supposedly to prevent mass shootings. Those involved efforts to monitor and track individuals with mental illness, or suspected of such, via smartphones and wearable health-monitoring devices that the FDA likely would regulate.<sup>265</sup>

In September 2020, the Department of Homeland Security sought to increase information collection on private individuals by proposing a costly—over \$6 billion—rule “that any applicant, petitioner, sponsor, beneficiary, or individual filing or associated with an immigration benefit or request, including United States citizens, must appear for biometrics collection without regard to age unless DHS waives or exempts the biometrics requirement.”<sup>266</sup> The DHS, now one of the costliest agencies, for months had been preparing regulation requiring biometric face scans of all travelers, including U.S. citizens, entering or leaving the country.<sup>267</sup> As *The New York Times* put it, “Unlike most of the efforts the administration has pushed, the rules intended to tighten immigration standards would expand federal regulations, instead of narrowing them.”<sup>268</sup>

Then, in December 2020, the Trump administration’s Centers for Disease Control and Prevention (CDC) instructed states to submit personal information—including names, birth dates, ethnicity, and ad-

resses—of individuals vaccinated against COVID-19, which raised alarm over misuse of a federal vaccine registry.<sup>269</sup>

***Online taxes.*** Taxes influence behavior and have regulatory effects. The tech sector is a natural target, given regulators’ designs on it. When the Internet sales tax was upheld in the 2018 Supreme Court case *South Dakota v. Wayfair, Inc.*,<sup>270</sup> the Competitive Enterprise Institute’s Jessica Melugin observed that “the U.S. Supreme Court reversed 50 years of precedent by allowing states to collect sales taxes from businesses located completely outside that states’ borders.”<sup>271</sup> While the ruling was by no means Trump’s doing, the president had seemed to favor an online sales tax, perhaps seeing it as a shot at Amazon, despite that company being one of the online sales tax’s most high-profile proponents.<sup>272</sup> On the international stage, French President Emmanuel Macron proclaimed on Twitter: “Some digital players pay very little tax. This is an injustice that destroys jobs. @realDonaldTrump and I have just agreed to work together on an agreement at the @OECD level to modernize international tax rules.”<sup>273</sup>

***Bipartisan large-scale infrastructure spending with regulatory effects.*** Often, the only bipartisanship seen in Washington is for passing big spending bills. Both parties show a great inclination toward fiscal stimulus in the form of infrastructure spending.<sup>274</sup> Although Trump issued several significant executive actions aimed at liberalizing infrastructure permitting and expansion,<sup>275</sup> that was countered by talk of a potential arrangement with House Speaker Nancy Pelosi (D-CA) on some form of major federal infrastructure spending package.<sup>276</sup> Proposed spending levels before the pandemic called for \$1 trillion in direct federal spending, with plenty of regulatory set-asides and stipulations that never materialized following Trump’s first impeachment.<sup>277</sup> Proposed dollar amounts then rose after the COVID-19 outbreak.<sup>278</sup>

Large-scale government infrastructure spending has massive, but undocumented, regulatory effects. It alters the trajectory and competitive environment of industries

engaged in large-scale transactions. At the agency level, the FCC's Rural Digital Opportunity Fund spent tens of billions of dollars in subsidies to bring old-school telephony into the modern age, with new mapping approaches to expand it in the future.<sup>279</sup> At one point, Trump championed the use of eminent domain to contribute to building a wall on the southern border, invoking the potential use of a "military version" of an already-awesome power.<sup>280</sup>

**Trade restrictions.** Trade wars do not work because tariffs hurt Americans.<sup>281</sup> Barriers create direct costs, regulatory uncertainty, and market losses—likely greater than the regulatory savings that Trump achieved. In a 2019 study of the Trump administration's trade policy on prices and welfare, the London-based Centre for Economic Policy Research found that the "full incidence of the tariff falls on domestic consumers, with a reduction in U.S. real income of \$1.4 billion per month by the end of 2018."<sup>282</sup> If one were to assume this trade barrier cost burden commenced in December 2018 and stayed constant, Trump's claimed regulatory savings before 2020 of \$51 billion would be eclipsed in about three years. Another assessment maintains that the trade war tariffs wipe out the typical household's savings from the tax reform package enacted under Trump.<sup>283</sup>

In a notable fusion of trade restrictions and infrastructure spending, Trump issued a January 2019 executive order on "Strengthening Buy-American Preferences for Infrastructure Projects."<sup>284</sup> That was followed in the summer of 2019 by an order for "Maximizing Use of American-Made Goods, Products, and Materials" in federal contracting, a regulatory sentiment with which Biden sympathizes.<sup>285</sup> A fixation on reciprocity in trade deals can increase costs of household-level imports like e-commerce purchases by ejecting de minimis exemptions.<sup>286</sup>

Anecdotes of harms from Trump trade policies abounded. The tariffs that were to boost the steel industry were deemed not to have had their desired effect.<sup>287</sup> Other unantici-

pated effects included craft distillers' cancelling of export plans with Europe,<sup>288</sup> calls for helping Maine's lobster industry suffering from the trade war,<sup>289</sup> and the oddity of reparative payments to farmers damaged by the trade war.<sup>290</sup> Harm to farmers increased in 2019,<sup>291</sup> compounded by the restorative aid benefiting the largest farmers.<sup>292</sup> Trump saws nothing amiss in the latter, upping the ante in January 2020 and proclaiming of a spending package, "We're signing a monster. A big, beautiful monster. Forty to fifty billion dollars to our farmers. ... I keep saying go buy larger tractors."<sup>293</sup> What are meant as dispute resolutions can result in overly managed, backward-looking trade.<sup>294</sup>

Frontier sectors, including artificial intelligence (AI) innovation, are vulnerable to trade restrictions as well. For example, regarding the Trump administration's pondering of a "potentially massive expansion of export restrictions on a wide variety of technologies," Adam Thierer and Jennifer Huddleston of the Mercatus Center at George Mason University noted that more "than a dozen different AI or autonomous system technologies appear on the list for consideration."<sup>295</sup>

Other notorious elements of the trade war with China included Trump's call for companies to leave China altogether, and for importers to police drug trafficking.<sup>296</sup> Shares of UPS, Amazon, and FedEx fell after Trump tweeted, "I am ordering all carriers, including Fed Ex, Amazon, UPS and the Post Office, to SEARCH FOR & REFUSE ... all deliveries of Fentanyl from China (or anywhere else!)." <sup>297</sup> Trump's advisers claimed the benefits of tariffs were forthcoming, but by the end of the former president's term, the trade war never achieved the purported objective of boosting U.S. manufacturing or reversed its decline.<sup>298</sup> As summed up by *Bloomberg News*, "China won Trump's trade war and got Americans to foot the bill."<sup>299</sup> The repeal of never-needed regulations was a groundbreaking development in 2020, and the failure to remove never-needed trade barriers is one of the most unfortunate missed opportunities.<sup>300</sup>

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*The FCC's long  
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regulation to cope  
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matters.*

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**Farm bill and agricultural intervention.** Many interventionist policies move along with a life of their own, but some deserve to be called out as overly regulatory, particularly when accentuated by an ostensible champion of deregulation like Trump. The \$860 billion farm bill, signed in December 2018, was a prominent example. Rep. Justin Amash, a former Republican, characterized it appropriately in May 2018, tweeting: "This farm bill is loaded with corporate welfare and subsidies. It's a big-government, anti-market swamp creature that puts special interests ahead of the American people. Every conservative should oppose it."<sup>301</sup> Trump, however, saw things differently: "The House will vote on a strong Farm Bill ... We must support our Nation's great farmers!"<sup>302</sup> This led to the absurd situation in which checks from the federal government composed 40 percent of American farmers' income in 2020—to make up for farmers' losses caused by tariffs.<sup>303</sup>

Stealth regulatory measures or requirements can also accompany what on the surface appear to be deregulatory ones. University of Pennsylvania Law Professor Cary Coglianese noted that when the "USDA [United States Department of Agriculture] lifted its import ban on pitahaya fruit," it also "imposed a regulatory regimen on production sites, calling for work plans, inspections, and various pest management techniques."<sup>304</sup> That USDA move highlighted the reality that rules operate beyond presidential control.

**Subsidies with regulatory effects.** Government spending often has regulatory effects, such as the displacement of private action by government-chosen ends, and the creation of marketplace distortions. These outcomes can come from unexpected quarters; the EPA, even during the Trump administration, considered subsidies for "talking car" technologies to communicate hazard and other information.<sup>305</sup> As a general matter, subsidies contribute to a president being able to, as Rep. Amash put it, "act as a central planner in chief to bribe and coerce companies."<sup>306</sup> As president, Trump left no doubt about his support of the Export-Im-

port Bank,<sup>307</sup> which has long been deemed a showcase for cronyism and corporate welfare.<sup>308</sup> It was reauthorized in 2019, and now continues its primary job of securing below-market financing for Boeing's largely state-owned customers.<sup>309</sup>

Trump also aggressively supported ethanol subsidies, warning (while in campaign mode in October 2018) that Democrats would be anti-ethanol.<sup>310</sup> His EPA issued a 2019 rule boosting the amount of ethanol allowed in gasoline blends during summer months.<sup>311</sup> In addition, Trump set about reassuring farmers in mid-2019: "Farmers are going to be so happy when they see what we are doing for Ethanol. ... It will be a giant package, get ready! At the same time I was able to save the small refineries from certain closing. Great for all!"<sup>312</sup>

**Telecommunications interventions.** The FCC's approach has been deregulatory, as noted, even as an independent agency not subject to Trump's one-in, two-out directive. But the FCC's long legacy of top-down, "expert" administrative control has cemented its impulse for new regulation to cope with mundane matters—like caller ID spoofing or robocalling—with inordinate fines when competitive markets in telecommunications might have put such matters to rest ages ago.<sup>313</sup> The embedded regulatory compulsion to address the routine makes it problematic to keep regulators away from more serious concerns in any sector, especially on the economic frontier. In the past, the public good or common property approach in telecommunications regulation led to the compounded costs of delays of cellular technology's availability to the public and induced airwave scarcity.<sup>314</sup> Unfortunately, we have not seen much of a shift away from that.

For example, early in the Trump administration, there were growing calls to build a nationalized 5G network.<sup>315</sup> That initial effort elicited a response letter to the administration from Sens. Ted Cruz (R-TX) and Catherine Cortez Masto (D-NV)<sup>316</sup> and the introduction of anti-nationalization legis-

lation in the 116th Congress.<sup>317</sup> A nationalized 5G effort would create extensive, costly long-term effects. Military justifications for investment and intervention into the development of a national 5G wireless network persisted from the Trump White House late in 2020—even in the face of some pushback from the Pentagon—with various security and international competition rationalizations offered, such as the rise of the likes of China’s Huawei Technologies.<sup>318</sup> And in October 2020, NASA announced it was partnering with Nokia to build a 4G network on the Moon.<sup>319</sup> These pressures are not likely to fade during the Biden administration.

Closer to Earth, and less ambitious than a national 5G network, is the FCC’s plans for subsidized rural 5G.<sup>320</sup> We find other mixed-bag proposals in the Trump era in the form of a December 2020 rule to promote “accelerated deployment of 5G and other advanced wireless services by facilitating the collocation of antennas and associated equipment on existing infrastructure while preserving the ability of state and local governments to manage and protect local land-use interests.”<sup>321</sup> This is all well and good, but it illustrates the problems created by the siloed nature of regulation of national infrastructure and the attendant neglect of more ambitious multiple uses of rights of way. For example, while 5G infrastructure grows, electric vehicle charging networks could grow alongside it.<sup>322</sup> It is long past time for regulation to catch up to that reality.

Policy makers in the Trump administration expressed a great deal of concern over foreign competition in telecommunication platform services. A June 2019 executive order, “Securing the Information and Communications Technology and Services Supply Chain,” aimed at preventing foreign adversaries’ use or acquisition of “any information and communications technology or service.”<sup>323</sup> This executive order was elevated to a proposed rule from the Commerce Department,<sup>324</sup> which appeared to arrogate an alarming degree of unilateral power to interfere in or block foreign transactions with entities controlled or influenced by

whomever the administration declares to be an “adversary.”<sup>325</sup> While Commerce invited comments at the time, it made clear that “the determination of a ‘foreign adversary’ for purposes of implementing the Executive order is a matter of executive branch discretion and will be made by the Secretary.”<sup>326</sup>

Related developments emerged in 2020 over assorted Trump administration acquisition rules halting agencies’ transactions with Chinese-owned businesses such as Huawei,<sup>327</sup> as well as executive orders targeting interactions with Chinese-owned online platforms like TikTok and WeChat, some of which faced or are facing legal challenges.<sup>328</sup> This course of action culminated in a January 2021 Trump executive order banning the payment platform Alipay and several other apps on privacy and security grounds.<sup>329</sup> These decisions, while problematic in some ways, do represent tough balancing acts. As former Cato Institute trade analyst Daniel Ikenson put it: “Economic protectionism is never a solution. But no less sacred than the rights of individuals to exchange freely the fruits of their labor is the obligation of government to protect its citizens from threats foreign and domestic.”<sup>330</sup> Carried beyond sound public protections, however, crony capitalism finds a close relation in “gatekeeper capitalism.”<sup>331</sup>

***Personal liberties incursions: health tracking, vaping, supplements, and firearms.***

Privacy and surveillance concerns are a major personal liberty issue, yet there are many others. While on the one hand, the FDA is said to be approving drugs at greater speed (which has worried some),<sup>332</sup> the agency under Trump engaged in numerous regulatory or potentially regulatory pursuits beyond the aforementioned Department of Health and Human Services’ hospital and drug disclosure/pricing regulations.

For example, in 2019, FDA guidance aimed to assert authority to clarify when the agency would regulate health-tracking apps and software as medical devices.<sup>333</sup> It is already regulating (“approving”) robotic exosuits for rehabilitation.<sup>334</sup> The agency also spent energy on regulations on vaping and smokeless

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*The Trump administration exercised regulatory impulses of its own in the financial arena.*

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tobacco products, which, as an alternative to cigarettes, save lives.<sup>335</sup> Trump did halt the push for a ban of all flavored e-cigarettes, but a federal appeals court has upheld FDA regulation of e-cigarettes' regulation as tobacco products.<sup>336</sup> In December 2019, as part of a defense spending bill, Trump signed into law a ban on the sale of vaping products to those under age 21.<sup>337</sup>

Also in 2019, in a move challenged on free speech grounds, the FDA sought to mandate graphic, photorealistic images on cigarette packages, in addition to the traditional surgeon general warning.<sup>338</sup> The FDA also pursued costly labeling regulation for non-dairy products that use the term "milk."<sup>339</sup> The administration also continued to implement Obama-era menu labeling rules,<sup>340</sup> and continued strengthening enforcement of the regulation of dietary supplements.<sup>341</sup> In one campaign, the FDA warned companies, while not banning the herb, to stop selling kratom as a treatment for opioid addition or cancer.<sup>342</sup>

Postal regulations aimed at combating opioid abuse sought to require identifying information and content disclosures on international shipments.<sup>343</sup> In a move controversial to his own base, Trump moved to ban bump stocks used on semiautomatic weapons by designating them as machine guns.<sup>344</sup> Finally, late in Trump's term, the Bureau of Alcohol, Tobacco, Firearms, and Explosives escalated scrutiny of makers of do-it-yourself gun kits.<sup>345</sup>

**Financial regulation.** Along with executive actions to liberalize the financial sector, the Trump administration signed legislation rolling back excesses of the 2010 Dodd-Frank law said to overburden smaller institutions.<sup>346</sup> As part of a fiscal 2020 spending package, Trump signed the Setting Every Community Up for Retirement Enhancement (SECURE) Act, which allows small businesses to band together to offer retirement plans and for part-time employees to participate in employer retirement plans.<sup>347</sup> Other steps toward liberalization included policies from the Consumer Financial Protection Bureau (now a fixture) easing the testing of certain

financial products and streamlining consumer disclosures.<sup>348</sup>

But as in other sectors, the Trump administration exercised regulatory impulses of its own in the financial arena, particularly with respect to new online offerings that threaten incumbent firms and the existing financial regulatory landscape. Prominent were efforts to regulate cryptocurrencies and to establish government-run electronic payment systems.

The Securities and Exchange Commission sought to regulate cryptocurrencies as "securities," which would saddle cryptocurrency developers with new layers of red tape.<sup>349</sup> Many companies failing to register their "tokens" were targeted with hefty penalties and restraining orders by the Trump-era SEC.<sup>350</sup> Yet the SEC had been given no legal jurisdiction over cryptocurrencies and tokens; its assertions and actions to the contrary constitute a power grab.<sup>351</sup>

While Democratic members of Congress proposed barring big tech's digital currencies,<sup>352</sup> Trump administration officials sought a clampdown. In July 2019, then-Treasury Secretary Steven Mnuchin called crypto a "national security" issue and said digital currency providers must be regulated and not allowed to operate in the shadows.<sup>353</sup> That same month, Federal Reserve Chair Jerome Powell testified in the Senate that Facebook's Libra "raises serious concerns" and "cannot go forward" without satisfying the government over money laundering and other concerns, and told senators that Fed oversight was "an interesting idea." In a three-part Twitter thread, the then-president expressed his distaste for crypto, stating that he is "not a fan of Bitcoin and other Cryptocurrencies, which are not money," that they are "highly volatile" and will have "little standing or dependability." He continued that if tech firms want to "become a bank," they must seek charters and become subject to all "Banking Regulations."<sup>354</sup>

In December 2020, statements that cryptocurrency regulation was on the way continued from the administration.<sup>355</sup> And

naturally, if you have income from cryptocurrencies or even use cryptocurrency in small retail transactions, the IRS expects to hear from you, despite a lack of clarity in the tax code on how and to what extent cryptocurrency should be taxed.<sup>356</sup>

In August 2019, the Federal Reserve announced efforts to create “FedNow,” a payment processing system designed to directly compete with private banks’ processing of electronic payments.<sup>357</sup> And in February 2020, at a conference hosted by the Stanford Graduate School of Business, Fed Governor Lael Brainard, an Obama appointee, said that the Fed is “conducting research and experimentation related to distributed ledger technologies and their potential use case for digital currencies, including the potential for a CBDC [central bank digital currency].”<sup>358</sup> In its enthusiasm to implement its “FedNow” scheme, the Fed may have skirted laws like the Congressional Review Act and the Paperwork Reduction Act.<sup>359</sup> Peter Wallison of the American Enterprise Institute called the Fed an agency with too much to do that should leave the payments system to the private sector.<sup>360</sup>

In addition, the Treasury Department contemplated regulations on foreign equity stakes in U.S. biotech firms in order to subject those firms to greater review.<sup>361</sup> Also troubling was the reported potential support in the former administration for a “global minimum tax” in the name of tax harmonization.<sup>362</sup> A late pro-regulatory development in the Trump administration was the Office of the Comptroller of the Currency’s issuing of the “fair access to financial services” rule, a “fairness doctrine” for banks to prevent discrimination based on political viewpoints or activities, which would undermine financial institutions’ freedom of association.<sup>363</sup> Yet, like the efforts to water down Section 230, that would likely backfire on conservatives worried about corporate leftward bias, such a rule could just as easily require lending to abortion clinics as well as to gun stores.<sup>364</sup>

***Industrial policy and interventionist impulses in frontier economic sectors.*** Overabundant taxpayer funding of scientific and

technology research is incompatible with a future of lightly regulated science and technology specifically, and with limited government generally.<sup>365</sup> Neither major political party takes that view in today’s rule-of-experts, send-tax-dollars-home America. Addressing infrastructure and other broad initiatives in his February 5, 2019, State of the Union address, for example, President Trump called for legislation “including investments in the cutting edge industries of the future” and proclaimed, “This is not an option; this is a necessity.”<sup>366</sup> Along with the regulatory effects of the strings attached to such spending, it is counterproductive for the sciences and their practical applications to proceed walled off from one another in an arbitrary legislative appropriations environment.

Artificial intelligence (AI) serves as a cautionary tale. The Trump administration OMB’s final “Guidance for Regulation of Artificial Intelligence Applications” was issued in November 2020,<sup>367</sup> and followed up in December 2020 by Executive Order 13960, “Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government.”<sup>368</sup> This process began in February 11, 2019, with Executive Order 13859, “Maintaining American Leadership on Artificial Intelligence,” which established the “AI Initiative.” That was followed by the March 19, 2019, launch of the federal hub AI.gov (changed to [whitehouse.gov/ai](https://whitehouse.gov/ai), a link now broken under Biden). Executive orders are not law, but they can influence policy, and Trump’s initial one promoted “sustained investment in AI R&D [research and development] in collaboration with industry, academia,” and others. Executive Order 13895 also called for federal collection of data, among other centrally coordinated moves. The order stated: “Actions shall be implemented by agencies that conduct foundational AI R&D, develop and deploy applications of AI technologies, provide educational grants, and regulate and provide guidance for applications of AI technologies.”<sup>369</sup>

This impulse toward “federalization” was concerning on its own, but AI and policy surrounding it occur in an environment in

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***Overabundant taxpayer funding of scientific and technology research is incompatible with a future of lightly regulated science and technology.***

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*Where one tech titan's motto had been “Don’t Be Evil,” a fitting admonition now for the AI sector is “Don’t Be Government.”*

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which much federal AI research happens at the Department of Defense. The Pentagon, on the day after Trump’s AI executive order, released its own AI strategy, describing use, plans, and ethical standards in deployment.<sup>370</sup> Where is a definition of AI codified in federal statute? In the John S. McCain National Defense Authorization Act for Fiscal Year 2019.<sup>371</sup> Alas, when it comes to robotics and the military, Isaac Asimov’s famous Laws of Robotics (devised to protect humans) are programmed out, not in. Where one tech titan’s motto had been “Don’t Be Evil,” a fitting admonition now for the AI sector is “Don’t Be Government.”

The OMB’s initial draft “Guidance for Regulation of Artificial Intelligence Applications,” which was directed at heads of federal executive branch agencies, struck the right tone.<sup>372</sup> It aimed at engaging the public, limiting regulatory overreach, eliminating duplication and redundancy across agencies, improving access to government data and models, recognizing that one size regulatory shoe does not fit all, using performance-based objectives rather than rigid rules, and avoiding overprecaution.<sup>373</sup> Michael Kratsios, then chief technology officer of the United States, called the guidance the “first-of-its-kind set of regulatory principles to govern AI development in the private sector” to “address the challenging technical and ethical questions that AI can create.”<sup>374</sup>

But make no mistake. These were a set of regulatory principles. The guidance stated: “When considering regulations or policies related to AI applications, agencies should continue to promote advancements in technology and innovation, while protecting American technology, economic and national security, privacy, civil liberties, and other American values, including the principles of freedom, human rights, the rule of law.”<sup>375</sup> The guidance mentioned “American values” five times, without recognizing the degree of incompatibility of the administrative state itself with those values.

As such, the guidance contained numerous elements that characterize the preset regula-

tory trap in which frontier industries find themselves. The guidance correctly noted, “The deployment of AI holds the promise to improve safety, fairness, welfare, transparency, and other social goals, and America’s maintenance of its status as a global leader in AI development is vital to preserving our economic and national security.” On the other hand, it asserted that “AI applications could pose risks to privacy, individual rights, autonomy, and civil liberties that must be carefully assessed and appropriately addressed.”<sup>376</sup> But governments, not competitive free enterprise, are the primary threat to these values, even in their own use of the very technology in question, which is largely military.

Agencies want to get in on the regulatory game, and the guidance unnecessarily invited them in. In evaluating “benefits and costs” of regulatory alternatives, agencies are to evaluate “impacts to equity, human dignity, fairness, potential distributive impacts, privacy and civil liberties, and personal freedom.”<sup>377</sup> This process has long favored agencies that seek to extend their authority. This bias will be especially endemic in the wake of Biden’s “Modernizing Regulatory Review” directive, which nullifies the balancing of costs versus benefits. The guidance also urged agencies to “consider whether a change in regulatory policy is needed due to the adoption of AI applications in an already regulated industry, or due to the development of substantially new industries facilitated by AI.”<sup>378</sup> Regulating the latter, as a blank canvas, will prove irresistible. No agency has an “Office of No” to resist top-down discretion.

The notion that large companies often favor regulations that disadvantage rivals is true of AI regulation: “Companies cannot just build new technology and let market forces decide how it will be used,” says one leading tech CEO.<sup>379</sup> While companies may not like overly burdensome regulations in general, established players—especially given the government contracting and military presence in AI—will appreciate federal approaches that forestall those with a different idea. Following are a few additional concerns with the guidance at this stage.

- The first item in the “Template for Agency Plans” asked agencies to establish “Statutory Authorities Directing or Authorizing Agency Regulation of AI Applications” and instructs them to “[l]ist and describe any statutes that direct or authorize [their] agency to issue regulations specifically on the development and use of AI applications.”<sup>380</sup> No definition of AI existed at the time of this request, which will likely serve as a rationale to justify future regulation.
- The guidance failed to engage Congress or recognize its primacy, and did not call on agencies to consult with Congress for clarity.
- The guidance invoked executive orders and OMB guidance and pursuits like maximizing net benefits and the preparation of “regulatory impact analyses” as restraints on excessive AI regulation, but those have not been able to restrain the proliferation of rules, facilitate regulatory streamlining, or ensure a hands-off approach. On the contrary, they are apt to be used to reinforce rather than resist calls for regulation.
- The guidance considered the expansion of antitrust regulation: “Agencies should also consider that an AI application could be deployed in a manner that yields anticompetitive effects that favor incumbents at the expense of new market entrants, competitors, or up-stream or down-stream business partners.”<sup>381</sup>
- The guidance suggested the possibility of more social policy regulation: “AI applications have the potential of reducing present-day discrimination caused by human subjectivity.”<sup>382</sup> It also stated: “When considering regulations or non-regulatory approaches related to AI applications, agencies should consider ... issues of fairness and non-discrimination with respect to outcomes and decisions produced by the AI application at issue.”<sup>383</sup> Further, it said, “[T]here is a risk that AI’s pursuit of its defined goals may diverge from the underlying or original human intent and cause unintended consequences—including those that negatively impact privacy, civil rights, civil liberties, confidentiality, security, and safety.”<sup>384</sup>
- The OMB directive may create vulnerability to the very guidance documents that the administration is seeking to restrain elsewhere. In the noted call for a premature inventory of sector-specific statutory authority, it encouraged agencies to use their conclusions regarding their authority “to issue non-regulatory policy statements, guidance, or testing and deployment frameworks.”
- Relatedly, there may be opportunities for rent-seeking in well-meaning attempts to “allow pilot programs that provide safe harbors” and at “collaboration with industry, such as development of playbooks and voluntary incentive frameworks.”<sup>385</sup> The White House guidance also encouraged “Federal engagement in the development of technical standards and related tools in support of reliable, robust, and trustworthy systems that use AI technologies” and said that, “Federal engagement with the private sector on the development of voluntary consensus standards will help agencies develop expertise in AI and identify practical standards for use in regulation.”<sup>386</sup> Such “voluntary consensus standards” will only be favored by some firms and entrepreneurs.

Sometimes, the source of problems is misdiagnosed. The OMB guidance called on agencies to “encourage the consideration of safety and security issues throughout the AI design, development, deployment, and operation process.”<sup>387</sup> But the government is more prone to try to undermine encryption used in private-sector applications, and—especially given government’s heavy “collaborative” role—to indemnify companies when things go wrong. The guidance also stretched the bounds of the possible. It acknowledged that “current technical challenges in creating interpretable AI can make it difficult for agencies to ensure a level of transparency necessary for humans to understand the decision-making of AI applications.”<sup>388</sup> No one can do this; it is the nature of black box machine learning.



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*The former administration's AI proclamations belong in the regulatory rather than the deregulatory camp.*

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The former administration's AI proclamations belong in the regulatory rather than the deregulatory camp, so it is good that "strong" AI (the potentially sentient, self-improving version) was ostensibly not addressed. Republicans and Democrats alike seek major government funding of science generally, including a proposal to appoint a "manufacturing czar."<sup>389</sup> Internationally, other governments are moving toward regulation along with the United States.<sup>390</sup> This state of affairs is not the fault of any individual policy makers, but is more likely due to the lack of a constituency for a hands-off approach. Unfortunately, in part due to Trump's order and subsequent guidance, we can confidently predict that future presidents will expand cozy government alliances with a subset of private-sector winners, and perhaps even promote a sort of cartelization. The legitimization of this concept at the top by an ostensibly deregulation-oriented president will make it harder to achieve regulatory liberalization and a separation of technology and state in the future.

The establishment of the Space Force, enacted in the National Defense Authorization Act of 2020,<sup>391</sup> presents the same potential for lock-in of a federally dominated frontier sector, given that commercial space activities have barely taken root beyond NASA contractors and partners.<sup>392</sup> Making the AI-driven Space Force a sixth branch of the armed forces is bound to affect both freedom of exploration and commercial space activities, heavily influencing technology investment in a still-nascent sector.<sup>393</sup> Unsurprisingly, entrepreneurs blame regulation for undermining commercial applications of space technology.<sup>394</sup>

The Space Force was preceded by a presidential directive on space traffic management, complete with tracking, cataloging, and data sharing with government.<sup>395</sup> It is worth remembering that most debris in space that is used to justify calls for regulation is there thanks to NASA, not private entrepreneurs.<sup>396</sup> "Normalizing" commercial space activities for a "diverse portfolio of actors and approaches" is incompatible with

heavy regulation.<sup>397</sup> But a light touch is not what we can likely expect from the revival of an intergovernmental National Space Council<sup>398</sup> and space policy directives propulsion that emerged in 2020.<sup>399</sup> Streamlined Federal Aviation Administration regulations on "streamlined commercial space launch and re-entry license requirements" issued in October 2020 are allegedly meant to replace "prescriptive regulations with performance-based" ones over the course of 785 pages.<sup>400</sup> Similarly, an October 2019 executive order established a President's Council of Advisors on Science and Technology that declares:

Through collaborative partnerships across the American science and technology enterprise, which includes an unmatched constellation of public and private educational institutions, research laboratories, corporations, and foundations, the United States can usher extraordinary new technologies into homes, hospitals, and highways across the world. These technologies would have American values at their core. By strengthening the ties that connect government, industry, and academia, my Administration will champion a new era of American research and innovation, which will give rise to new discoveries that create the industries of the future."<sup>401</sup>

This directive appeared in the wake of Executive Order 13885, "Establishing the National Quantum Initiative Advisory Committee,"<sup>402</sup> aimed at implementing the 2018 National Quantum Initiative Act in its goal of "supporting research, development, demonstration, and application of quantum information science and technology."<sup>403</sup> These national industrial policy developments can be expected to accelerate under Biden.<sup>404</sup>

The takeaway from this section and earlier ones is that a great deal of industrial policy-oriented moves that were proposed or enacted under Trump—including on antitrust, 5G and other major infrastructure, financial plat-

forms, artificial intelligence, space, and other big science—can further entrench government intervention and displace more market-oriented approaches that might enable the scaling back of the federal role in the future.

***Novel welfare and labor regulations.*** Noted earlier is the propensity for federal government involvement in job training. The Trump administration launched a “national strategy for training and retraining workers for high-demand industries,” spearheaded by Ivanka Trump.<sup>405</sup> In other labor regulation, the president signed into law the Fair Chance Act, which bars government and contractors from inquiring into job applicants’ criminal history before making an offer. Some companies follow such guidelines already, but this move was meant to “ban the box,” the familiar job application query into whether or not one has been convicted of a crime.<sup>406</sup> It represented a form of regulation that can backfire and aggravate the discrimination problem it was purported to solve—but as often happens, only the public will suffer from the move, not those who imposed a faulty rule.<sup>407</sup>

In addition, a “nationwide paid family leave” plan was touted by Trump in his second State of the Union address,<sup>408</sup> an issue since taken up by legislators on both sides of the aisle.<sup>409</sup> Senators released a “bipartisan framework” for mandated family leave in the summer of 2019.<sup>410</sup> The plan ultimately came to fruition in the same December 2019 compromise defense spending package that included the creation of the Space Force.<sup>411</sup> “In the end,” as Sen. Ron Johnson (R-WI) put it: “President Trump should get full credit for this because he’s the one who made it happen. I know the Democrats won in the House, but this would not have happened had not President Trump strongly supported it.”<sup>412</sup>

This development represents another example of the extent to which regulation is fiscally driven. As Ivanka Trump, speaking in her role representing the federal government, put it: “It’s very hard for people to say, well, employers should provide this benefit—if we are unwilling to provide it ourselves. So you

have to lead by example.”<sup>413</sup> Such mandates impose costs on businesses that never show up in the federal budget.

Also in the summer of 2019, Trump signed legislation that required all federal buildings to provide a room for nursing mothers to breast feed, including members of the public, as well as federal employees. The mandate is so specific that it requires that “rooms provide privacy and contain a chair, working surface, and an electric outlet for breast pumps,” as National Public Radio described it.<sup>414</sup>

### ***COVID-related regulation as opposed to deregulation.***

And by the way, I’d love to do stimulus, but Crazy Nancy doesn’t want to do it.<sup>415</sup>

—Donald Trump, West Salem, Wisconsin, October 27, 2020

When somebody is the president of the United States, the authority is total and that is the way it’s gonna be. It’s total. It’s total. And the governors know that. When somebody is the President of the United States, the authority is total.<sup>416</sup>

—Donald Trump, April 2020

Despite proclamations of holding total authority over forcing states to reopen early in the pandemic, the early phase of Trump’s COVID response—evident in a reluctant embrace of the awesome emergency powers granted by Congress in the Defense Production Act (dozens of actions from preventing hoarding of medical supplies<sup>417</sup> to production or prioritization of them<sup>418</sup>)—was that of a president not taking the usual approach of seizing power during a crisis.<sup>419</sup> Instead, the administration worked to deregulate and make regulatory waivers permanent in the name of both fighting COVID and providing economic relief. Nonetheless, regulation expanded in a number of ways under Trump during the COVID response in a manner that deregulation was incapable of offsetting.

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First, the coronavirus-related bailout statutes themselves created new government regulatory programs, for which permanence is likely.<sup>420</sup> For example, labor regulations similar to those covered above were signed into law by Trump in the form of the Families First Coronavirus Response Act, which expanded paid sick leave and family and medical leave at the time businesses were least able to afford it.<sup>421</sup> Another major development—too sweeping to explore fully here—was the degree to which government entered credit markets and supported some businesses, but not others, through unprecedented Federal Reserve direct lending to companies and a Paycheck Protection Program, with loan forgiveness. Such programs are subject to abuse by questionable recipients enabled by the absence of watchdogs.

Second, given the administrative state's pervasiveness, even supposedly deregulatory efforts aim at making government programs, even questionable ones, work "better," which can preempt efforts by future generations aimed at moving these programs out of government hands and into private management and realms.

Third and most troubling was Trump's August 2020 pandemic-related executive orders that expanded regulation and executive overreach.<sup>422</sup> They were in part meant to extend lapsed components of the Coronavirus Aid, Relief, and Economic Security (CARES) Act when the administration failed to negotiate a new stimulus agreement with House Democrats.<sup>423</sup> Perhaps most invasive and detrimental to property rights was the executive order on housing assistance and "lawful measures to prevent residential evictions and foreclosures."<sup>424</sup> These moratoriums on evictions unfairly force landlords, who are often themselves struggling members of the middle class, to bear the burden of the crisis.<sup>425</sup> As Rep. Thomas Massie (R-KY) expressed it on Twitter, "CDC inserting itself into private rental contracts, effectively transferring control of private property from the lawful owner to the renter, is possibly the most socialist action our government has taken in decades ... and without an act of

Congress!"<sup>426</sup> He also noted, "Rental contracts are governed by state law. There is no federal authority to overturn them."<sup>427</sup>

There were three memoranda: an extension of supplemental unemployment benefits using emergency funds,<sup>428</sup> a payroll tax deferral until year-end for certain earners,<sup>429</sup> and student loan relief and deferrals.<sup>430</sup> Trump made it clear that he was taking his cues from the Obama-era Department of Homeland Security's Supreme Court-validated unilateral action on Deferred Action for Childhood Arrivals (DACA).<sup>431</sup> Trump, who had criticized Obama's actions, claimed on Twitter: "The DACA decision, while a highly political one, and seemingly not based on the law, gives the President of the United States far more power than EVER anticipated."<sup>432</sup>

The conundrum over constitutionality or perception of Trump's COVID-relief executive actions<sup>433</sup> is rooted in the erosion of the Constitution and its regime of limited government. Trump's late-term actions—unlike other actions taken to roll back the expansion of government—expanded federal authority at the expense of state sovereignty, individual rights, and local communities' ability to adapt and respond to the next crisis or disaster.<sup>434</sup>

The above is an incomplete catalog of active policy implementations and proposals with substantial regulatory heft that ran counter to the administration's deregulatory campaigns generally and as summarized by OMB in each year's "Regulatory Reform Report: Completed Items for Fiscal Year." That official roundup catalogs many less dramatic examples of the kinds of regulatory actions noted here.

Individual rules and regulations matter, but the overall structure of the market, business environment, and prospects for economic growth are also heavily influenced by overarching government policy. Large-scale federal initiatives morph over time into interventions unforeseen and unintended—or perhaps not so unintended. The administrative state and big-spending

appropriations framework exert a considerable influence. Trump could not and did not stop it all, which is to be expected, but he also added his own pro-regulatory predispositions to the landscape, which are enough to outweigh his claimed billions in cost savings from regulatory streamlining.

There were ambiguities in Trump-era actions as well. Changes with ambiguous effect may be rooted in factors that predate Trump. For example, some items get deemed deregulatory compared with the status quo, such as streamlining of subsidized small-business loans, yet are still distortionary of the market.

In March 2019, Trump issued an executive order mandating “free speech” at colleges that receive federal research or education grants.<sup>435</sup> Free speech is nonnegotiable in society, but such a directive would not be an issue were government not funding education and inflating its cost in the process. Also illustrative of ambiguities was Trump’s revocation of an Obama “gainful employment” rule cutting off funding to poorly performing for-profit colleges, while leaving nonprofit ones alone. The question of whether either type should receive federal funding was never considered.<sup>436</sup> A similar situation exists with respect to a Trump rule that invoked “Federal conscience and anti-discrimination laws” that take into account religious objections to providing certain services, or that prevent certain abortion referrals by health clinics that receive federal dollars. Had there been no federal funding, there would have been no (or less) “regulation” over which views deserve a hearing.

Other prominent directives include:

- Joint State Department and Department of Homeland Security issuances on “inadmissibility on public charge grounds”<sup>437</sup> in response to Trump’s intent to suspend immigration that would “Financially Burden the United States Healthcare System, in Order to Protect the Availability of Healthcare Benefits for Americans”;<sup>438</sup>

- The Department of Agriculture’s changes to the Supplemental Nutrition Assistant Program’s eligibility and asset rules;<sup>439</sup>
- Work requirements for the able-bodied with no dependents;<sup>440</sup> and
- A Department of Housing and Urban Development proposed rule on public housing eligibility and asset limitations.<sup>441</sup>

All these are characterized as regulatory and appear as part of the one-in, two-out “Regulatory Reform Report: Actions for Fiscal Year 2019.”<sup>442</sup> Relatedly, particularly given the COVID regulatory actions just discussed, 28 Small Business Administration rules related to the Paycheck Protection Program at the not completed stage were deemed economically significant by the time the Fall Unified Agenda appeared, yet were designated neither regulatory nor deregulatory.<sup>443</sup>

It is noteworthy in this regard that efforts to make government spending more difficult or to tighten benefits eligibility or qualifications for government programs get characterized as costs. Even components of the deregulatory repeal of the EPA’s Clean Power Plan were deemed regulatory in the Unified Agenda disclosures and in the 2019 Regulatory Reform Report.<sup>444</sup> That was also the case with the Trump SEC’s ostensibly deregulatory rewrite of the Obama Department of Labor’s “fiduciary rule” targeted at investment advisers. While better, these remain costly, and since the SEC is an independent agency, the rule did not appear in the one-in, two-out roundup.<sup>445</sup>

These peculiarities further show the difficulty of disclosure. Regulatory streamlining may do only short-term good. Congress has not passed comprehensive regulatory liberalization in nearly a quarter century, and streamlining via Executive Order 13771 became more difficult as quick-to-rid regulations were exhausted. As the University of Pennsylvania’s Gary Coglianese observed, “In a single year the regulatory rule book simply cannot be changed dramatically enough to make a palpable dent in the obligations im-

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*Large-scale federal initiatives morph over time into interventions unforeseen and unintended—or perhaps not so unintended.*

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posed on industry.”<sup>446</sup> Therefore, the pertinent question going forward should be whether any degree of executive branch regulatory liberalization can be maintained over time given the administrative state’s barriers and resistance to any reform at all.

When all is said and done, the administrative state cannot be said to have fundamentally changed under Trump. While agencies like the FCC, EPA, and CFBP were led by pro-liberalization appointees—and at

one point operated under an instruction from then-OMB Director Mick Mulvaney that deregulation should be their “highest priority”<sup>447</sup>—the permanent bureaucracies were merely biding their time. Without congressional action on general reforms, much of the Trump streamlining phenomenon will be transitory, especially given the many added regulatory structures covered in this section. A pruned weed is a healthy weed when it comes to the administrative state’s half-hearted rollbacks.<sup>448</sup>

# Toward a Federal “Regulatory Budget”

When Congress spends, no one questions that disclosure is necessary for voters to hold representatives accountable. Federal expenditure programs are funded either by raising taxes or by borrowing against a promise to repay with interest from future tax collections. Taxpayers can observe those decisions during the authorization and appropriations processes (not that it is a simple thing to do). They can inspect the costs of programs and agencies in Congressional Budget Office publications and in the federal budget’s historical tables.<sup>449</sup> The point is, disclosure for spending exists, however difficult it may be to access specific information.

However, Congress often “funds” objectives and programs through regulatory mandates. Regulation and spending are both mechanisms by which governments act or compel individuals. Rather than taxing and paying directly, federal regulation can compel the private sector, as well as state and local governments, to bear the costs of federal initiatives. Regulation in such instances functions as an off-budget form of taxation and spending. Although disclosure of spending obviously does not stop deficits and debt, it is still vital for making progress toward those ends. Likewise, policy makers should disclose regulatory costs to the extent possible so that the decision of whether to regulate can at least have an opportunity to get the full consideration it deserves.

Because the costs and economic effects of regulatory compliance are not budgeted and disclosed the way that federal spending is, regulatory initiatives can commandeer private-sector resources with comparatively little public controversy. Policy makers may find it easier to impose regulatory costs than to embark on government spending because of the former’s lack of disclosure and accountability. And when regulatory compliance costs prove burdensome, Congress can escape accountability by blaming an agency for issuing an unpopular rule.

In fact, “regulation” may be too narrow a term to capture the effects of today’s wholesale government intervention into a vast array of areas, from health care and education to retirement. Much of this pursuit is aimed at progressives’ North Star of a universal basic income, an idea seductive to some conservatives and libertarians as well.<sup>450</sup> That cost calculations are largely impossible is not the fault of critics of the regulatory state. Nonetheless, they need to be assessed and described to the public, at least in the aggregate.

Table 2 provides an overview of the 2021 federal regulatory enterprise to be discussed in the following pages.

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*Regulatory initiatives can commandeer private-sector resources with comparatively little public controversy.*

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Table 2. The Regulatory State: A 2020 Overview

	<b>Year-End 2020</b>	<b>1-Year Change (2019–2020)</b>	<b>5-Year Change (2016–2020)</b>	<b>10-Year Change (2011–2020)</b>
Total regulatory costs	\$1.9 trillion	n/a	n/a	n/a
Agency enforcement budgets	\$78.0 billion	5.5%	13.1%	20.7%
<i>Federal Register</i> pages	86,356	19.2%	–9.9%	6.6%
Devoted to final rules	32,223	55.0%	–16.6%	22.6%
<i>Federal Register</i> final rules	3,353	–13.1%	–13.0%	–11.9%
<i>Federal Register</i> proposed rules	2,149	1.0%	–11.0%	–26.0%
Code of Federal Regulations pages*	185,984	0.3%	4.3%	12.4%
Total rules in Agenda pipeline	3,852	2.7%	16.1%	–6.7%
Completed	630	15.4%	–5.3%	–37.6%
Active	2,636	1.3%	25.8%	–1.5%
Long term	586	–10.5%	17.4%	–27.4%
“Economically significant” rules in the year-end pipeline	261	35.9%	35.2%	23.1%
Completed	58	31.8%	23.4%	28.9%
Active	173	45.4%	53.1%	25.4%
Long term	30	3.4%	–9.1%	3.4%
Rules affecting small business	635	–1.4%	–5.4%	–22.7%
Regulatory flexibility analysis required	350	0.9%	–15.4%	–16.3%
Regulatory flexibility analysis not required	285	–4.0%	10.0%	–29.5%
Rules affecting state governments	409	6.0%	15.2%	–20.0%
Rules affecting local governments	258	11.2%	22.3%	–18.4%
GAO Congressional Review Act reports on major rules	90	12.5%	–22.4%	12.5%

n/a = not applicable.

\* year-end 2019

# What Comes after “Trillion”?

## The Unknowable Costs of Regulation and Intervention

If real debt levels on the fiscal budget and entitlements can be vastly higher than the public is generally told, what might that say about the true costs of the even less disciplined regulatory enterprise?<sup>451</sup> The nonchalance with which those costs are treated extended even to former President Trump, who had asked staff to postpone looking until his second term, which did not materialize.<sup>452</sup> “Who the hell cares about the budget,” Trump reportedly proclaimed at a January 2020 fundraiser.<sup>453</sup> Soaring peacetime deficits and debt proliferated at a time of low interest rates, now compounded by unprecedented COVID-related spending. We can expect more rescue-by-deficit spending during some future recession or crisis.<sup>454</sup> When reckonings come and spending options disappear, regulation can become more of a fallback.

The federal government undertakes little review of federal regulation to assure that individual regulations do more good than harm and no assessment of regulatory burdens as a whole.<sup>455</sup> The sole official reckoning citizens get regarding the scale and scope of regulatory costs is an annual—in law<sup>456</sup> but not in practice<sup>457</sup>—OMB survey of a subset of regulatory costs and benefits called the *Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act*.<sup>458</sup> These reckonings contain a limited overview of significant rules and a partial quantification of costs and benefits of a handful of executive agencies’ rules during the current fiscal year and the most recent 10 years. It has not been seen for several years now. The aggregate annual estimate of the cost of the regulatory enterprise required by law<sup>459</sup> has not been performed since 2002.<sup>460</sup>

OMB’s 2017 *Report to Congress on Benefits and Costs*, covering fiscal year 2016 Obama-era rules and regulations, arrived nearly four years overdue, in December 2019.<sup>461</sup> This report has a long history of tardiness and incompleteness, but that years-long delay was unprecedented.<sup>462</sup> A frenzy to catch up brought forth a truncated *Draft Report* combining the overdue fiscal years 2018, 2019, and 2020 in one abbreviated volume the day before Christmas Eve in 2019,<sup>463</sup> along with helpful supplemental tables in electronic format, but without the 10-year lookbacks that had become standard, let alone the aggregate estimate required by law.<sup>464</sup> Undated final reports for these years, covering the period through FY 2019, have now appeared on OMB’s website with a URL indicating they were uploaded in January 2021.<sup>465</sup> While the reports were late, the public did get the year-end status reports on Trump’s one-in, two out Executive Order 13771 directive on agency regulations.<sup>466</sup>

OMB’s last 10-year survey from FY 2016 reported that federal agencies published 36,255 final rules in the *Federal Register*, and that it reviewed 2,670 of those final rules under Executive Order 12866. Of those OMB-reviewed rules, 609 were considered major. Yet OMB claimed high net regulatory benefits, pegging the cumulative benefits of a selection of 137 of 609 major regulations issued between 2006 and 2016 at between \$287 billion and \$911 billion (in 2015 dollars). The estimated range for the decade’s costs was \$78 billion to \$115 billion. The 16 rules subjected to both benefit and cost analyses during FY 2016 added annual costs in the range of \$4.3 billion to \$6.4 billion.

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*The aggregate annual estimate of the cost of the regulatory enterprise required by law has not been performed since 2002.*

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## Regulators decide what counts as major.

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Bringing it all up to date, the new White House composite report on fiscal years 2017–2019 covers a handful of rules and acknowledges total costs and benefits of only a few billion each.<sup>467</sup>

- FY 2017: \$6.9 billion to \$11 billion in annual benefits; \$2.5 billion to \$3.7 billion in annual costs (2016\$)
- FY 2018: \$0.2 billion to \$0.6 billion in annual benefits; \$0.1 billion to \$0.3 billion in annual costs (2017\$)
- FY 2019: \$0.2 billion to \$3.7 billion in annual benefits; up to \$0.6 billion in annual costs (2018\$)

Regulators decide what counts as major. As OMB acknowledges in the 2018, 2019, and 2020 *Report to Congress*: “As has been the practice for many years, all estimates presented ... are agency estimates of benefits and costs, or minor modifications of agency information performed by OMB.”<sup>468</sup> OMB admits that its report “does not purport to demonstrate all costs or benefits from federal regulation; instead, the report summarizes the anticipated costs and benefits that the Regulatory Impact Analyses (RIAs) of individual final rules reported for those rules.”<sup>469</sup> The administration acknowledges what it calls an “often-overlooked detail”—that “the totals listed ... include only the benefits and costs for the minority of rules for which both those categories of impacts were estimated.”<sup>470</sup>

As this report will cover, nearly 13,000 rules and regulations, large and small, have been issued since Trump’s inauguration, but the amalgamated three-year report features only 30 rules with both benefits and costs “quantified and monetized,” and another 28 with costs alone quantified, in some cases partially.<sup>471</sup> Meanwhile, very few of the regulations covered earlier find their way into OMB-style analyses. For the categories it does cover, OMB asserts the major rules—including budget rules—it reviewed “represent approximately one-fourth” of the significant regulatory actions reviewed by OMB.<sup>472</sup> Overall, the 2018–2020 consolidated *Report to Congress* encompasses only 145 “major”

rules, a small number compared with the 9,604 rules issued during the corresponding calendar years.<sup>473</sup>

Of the hundreds of executive agency major rules issued since 2001 (among tens of thousands of nonmajor rules issued), just a relative handful received OMB-reviewed quantified cost analysis, let alone cost *and* benefit analysis; overall about 38 percent had quantitative cost estimates.<sup>474</sup> When one looks beyond the officially self-designated “major” rules, the proportion of all rules with any reviewed cost analysis averages less than 1 percent.<sup>475</sup>

OMB references a 2004 claim that the “major” rules reviewed account for the bulk of regulatory costs.<sup>476</sup> Earlier OMB reports had been more forthcoming about indirect and unaccounted costs. Even today, OMB does not review *independent agency* rules like those of the FCC or financial regulatory bodies. Entire categories of economic and social regulatory intervention like those referenced in Box 3 are not captured in the current OMB review process. Even the Unfunded Mandates Reform Act, surveyed in the *Report to Congress*, exempts a great deal of regulatory intervention from critical analysis.<sup>477</sup>

Transfer and budget programs, unless directly related to national defense or criminal justice, are inherently interventionist and regulatory in nature. Yet the costs and market distortions caused by such federal spending are not counted,<sup>478</sup> nor are the deadweight effects of such budget rules, even when the federal government has taken over a substantial portion of retirement and senior health care.<sup>479</sup> Pell Grants alter private college financing. Federal medical programs have altered the medical market to such an extent that single-payer insurance is now contemplated. Washington’s expansion of middle-class dependency on the federal government is about as fundamental as social regulation gets, yet it is not counted as costs—especially now that the Biden administration’s benefit assertions in the “Modernizing Regulatory Review” order replace any

cost balance.<sup>480</sup> Agencies conducting reviews will be inherently reluctant to conduct cost-benefit analysis or to acknowledge that regulations impose a net cost.

The fundamental problem with the regulatory *Report to Congress* is that net-benefit analysis helps fuel indefinite expansion of government. Creative regulators can alternate between maximizing net benefits (as in OMB's 19-year-old "Circular A-4" guidance on regulatory analysis) and claiming that benefits "justify" costs as specified in Executive Order 12866. Cost-benefit analysis is conveniently silent on benefits that may have accrued if an agency's "regulatory budget" allocation belonged to another agency instead. So there exists no genuine net-benefit pursuit adopting a wider perspective than that of agencies in isolation. Still further, costs of "regulatory dark matter"—such as agency memoranda, guidance documents, bulletins, circulars, and manuals—do not appear in OMB's annual assessments. Executive orders' effects are unaccounted for.<sup>481</sup> Far too much is left out, despite OMB's decades of experience.

In contrast to OMB's traditionally narrow focus, a 2019 report from the Council of Economic Advisers, *The Economic Effects of Federal Deregulation*, pointed to hundreds of billions in direct and indirect annual savings from changes not just in a set of rules removed but in approaches to regulation as such:

The Council of Economic Advisers (CEA) estimates that after 5 to 10 years, this new approach to Federal regulation will have raised real incomes by \$3,100 per household per year. Twenty notable Federal deregulatory actions alone will be saving American consumers and businesses about \$220 billion per year after they go into full effect. They will increase real (after-inflation) incomes by about 1.3 percent. ...

This new approach to regulation not only reduces or eliminates costly

regulations established by prior administrations but also sharply reduces the rate at which costly new Federal regulations are introduced. The ongoing introduction of costly regulations had previously been subtracting an additional 0.2 percent per year from real incomes, thereby giving the false impression that the American economy was fundamentally incapable of anything better than slow growth.<sup>482</sup>

In touting deregulatory actions and their purported benefits in July 2020, the administration claimed that "President Trump has signed 16 pieces of deregulatory legislation that are expected to result in a \$40 billion increase in annual real incomes."<sup>483</sup> Further, the administration's deregulatory actions would save additional billions not entirely captured in the year-end updates on one-in, two-out. For example, the White House claimed that the "implementation of the SAFE [Safer Affordable Fuel-Efficient] Vehicles Rule is estimated to increase the real incomes of Americans by \$53 billion per year over the 2021–2029 period."<sup>484</sup>

During the coronavirus outbreak, the CEA estimated the savings from regulatory streamlining related to pandemic recovery:<sup>485</sup>

The total value of more widespread adoption of telemedicine would be approximately \$325 billion per year. Reducing FDA approval times by relaxing overly burdensome impediments to drug development would have a net present value of \$1.9 trillion if approval times are sped up by one year, \$3.9 trillion if sped up by two years, and \$5.9 trillion if sped up by three years. Expanding occupational licensing deregulation for nurse practitioners nationwide could result in \$62 billion in cost savings for patients annually.

Many changes made over the past few years are on the chopping block in the Biden administration, but the inference of the CEA

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***Regulatory costs are unknowable in an elemental sense. They are not observable or calculable.***

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approach is that far greater costs exist that can be attributed to regulation than the annual *Report to Congress* has addressed. For example, regulation affects not only current jobs, but also entrepreneurs' inclination to create new ones in the future. This intertemporal nature of regulation complicates cost assessment, since jobs that have not been created cannot be "lost."

The CEA's assertions in its 2019 *Economic Effects of Federal Deregulation* report were blasted as "bad fiction"<sup>486</sup> by progressives and received some left-leaning "fact checks."<sup>487</sup> But if there is validity to the propositions that such regulatory changes (and those during COVID-19) reduced costs substantially, it is also reasonable to presume prior increases in regulation will have added billions of dollars beyond what is seen in the normal compliance measures. Government steering without issuing a rule is also "regulation," as implied in the CEA report. Therefore, it is appropriate to address the costs of progressive policies and the benefits of lifting them.

Regulatory costs are unknowable in an elemental sense. They are not observable or calculable—and many of the economic calculations necessary to enable central economic planning are impossible.<sup>488</sup> That is why the real goal for restraining the growth of government is not regulatory reform alone, but rather restoration of Congress' lawmaking duties under Article I of the Constitution. Even so, the need for disclosure is an imperative as long as the administrative state persists. The solution in the meantime is for Congress to internalize costs by voting on costly and controversial rules (eventually and ideally all of them) and to avoid passing overly broad and vague legislation that delegates tremendous authority to administrative agencies.

Making matters worse, the federal bureaucracy, even with all the vast resources at its disposal, has done nothing to fulfill its duty to assess the aggregate effects of regulation and intervention in which it engages.

The Small Business Administration (SBA) last published an assessment of the federal

regulatory apparatus in 2010, pegging regulatory compliance costs at \$1.75 trillion for 2008, but that report was discontinued and has not been replaced. The primary purpose of the SBA report series was not an aggregate cost estimate but rather an examination of regulatory burdens on small firms, which have higher per-employee regulatory costs than larger ones. Earlier government assessments from around the turn of the 21st century from OMB, the GAO, and the SBA also found aggregate annual costs in the hundreds of billions of dollars, some in excess of \$1 trillion in the 2013 dollars depicted in Table 3.

Performing an aggregate estimate was never the SBA's job, but remains OMB's neglected duty. The data underlying these studies were problematic.<sup>489</sup> In the final analysis, the annual OMB cost-benefit breakdown omits the independent agencies that account for so many regulations. It also incorporates only those rules for which agencies have calculated both benefits and costs. That amounts to a couple dozen at best, even as, each year, agencies issue several thousand rules and guidance documents.

Box 3 illustrates a wide range of regulatory and administrative state interventions that go unacknowledged.<sup>490</sup>

Private entities have attempted to quantify regulatory costs. In a 2014 report, the National Association of Manufacturers (NAM) modeled 2012 total annual regulatory costs in the economy of \$2.028 trillion (in 2014 dollars).<sup>491</sup> The NAM report drew its share of detractors.<sup>492</sup> Another report—by economists John W. Dawson of Appalachian State University and John J. Seater of North Carolina State University—counts the long-term reduction in economic growth caused by decades of cumulative opportunity costs imposed by economic regulation. Their report posits dozens of trillions of dollars in lost gross domestic product (GDP) annually. They contend that rules affecting growth rates compound, and that Americans are less than half as rich as they would be in the absence of much of the regulatory state.<sup>493</sup>

## Box 3. Unmeasured Costs of the Administrative State and Intervention

### I. Unmeasured Costs of Shortcomings in Administrative Procedure Act Oversight

#### A. Rule Cost Categories Prone to Escaping Measurement and Disclosure<sup>494</sup>

- Costs of rules not deemed economically significant by agencies that in fact are economically significant
- Costs of independent agency regulations
- Costs of unfunded mandates on states and localities
- Costs of interpretive rules and guidance documents
- Indirect costs
- Job costs of regulation

#### B. Process/Oversight Shortcomings Generating Unknown Financial and Societal Costs<sup>495</sup>

- Costs of abandonment of formal rulemaking
- Costs of agencies' failure to issue a notice of proposed rulemaking for a significant portion of rules
- Costs of agency-gamed notice-and-comment processes
- Costs of agencies' undermining of the Congressional Review Act by failing to submit final rules to Congress and the Government Accountability Office for consideration
- Costs of baked-in pro-regulatory bias of the administrative state
- Costs of policy uncertainty
- Costs of regulation by sue-and-settle agreements
- Costs of regulatory accumulation
- Costs of differential effects of rules on businesses

### II. Unmeasured Costs of the Loss of Liberty<sup>496</sup>

- Costs of regulatory takings and property value destruction<sup>497</sup>
- Costs of abandoning negative rights for a positive rights framework and unequal treatment of citizens<sup>498</sup>
- Costs of delegation of lawmaking power to the executive branch and to unelected administrators<sup>499</sup>
- Costs of agency liberation from Congress through self-funding<sup>500</sup>
- Costs of paternalism and the normalization of dependency
- Costs of imposing regulation based on secret or creatively leveraged data<sup>501</sup>
- Costs of abandoned federalism<sup>502</sup>
- Costs of authoritarianism and overcriminalization<sup>503</sup>
- Costs of loss of anonymity due to state surveillance<sup>504</sup>

### III. Costs of Spending and Legislative Programs with Sweeping Regulatory Effect

- Costs of top-down national plans, agendas, and treaties<sup>505</sup>
- Costs of distortions created by "ordinary" federal spending, subsidies, and stimulus<sup>506</sup>
- Costs of deadweight effects of federal spending<sup>507</sup>
- Costs of government spending to steer investment in science and technology

### IV. Costs of the Derailment of Market Institutions

- Costs of the presumption of agency expertise (and denial of non-expertise and disruption)<sup>508</sup>
- Costs of the market failure fallacy and disregard of government failure
- Costs of interference with price, distribution, and access mechanisms
- Costs of antitrust regulation and the institutionalization of raising competitors' costs<sup>509</sup>
- Costs of blurring corporate and government roles with government-sponsored enterprises and public-private partnerships<sup>510</sup>
- Costs of government steering by direct ownership or control of resources<sup>511</sup>
- Costs of abandoning property rights
- Costs of hyperregulatory public utility, infrastructure models
- Costs of anti-property approaches to environmental amenities and concerns<sup>512</sup>
- Costs of overlicensing
- Costs of cronyism through rent-seeking<sup>513</sup>
- Costs of permanent bureaucracy<sup>514</sup>

### V. Costs of Lethality

- Costs of the precautionary principle and the derailment of normal evolutionary risk-management innovation
- Costs of selective expression of benefits
- Costs of ignoring reductions in general wealth and health induced by regulation
- Health costs of rent-seeking
- Costs of undermining markets in information

Table 3. Assessments of Federal Regulation: Late 20th Century, Early 21st Century, Billions of Dollars

	Hopkins 1992 (1991 dollars)	Government Accountability Office 1995 (1995 dollars)	Hopkins 1995 (1995 dollars)	Small Business Admin. 2001 (2001 dollars)	Office of Management and Budget 2002 (2001 dollars)	Small Business Admin. 2005 (2004 dollars)	Small Business Admin. 2010	National Association of Manufacturers 2014 (2012 dollars)
Environmental	115		168	197	203	221	281	330
Other Social	36		55		30			
Transportation					22			
Labor					22			
Economic Regulation						591	1,236	1,448
Efficiency	73		80		150			
Transfers	130		147		337			
Efficiency - Domestic				101				
Transfers - Domestic				202				
Efficiency - Int'l Trade				44				
Transfers - Int'l Trade				88				
Workplace and Homeland Security				82		106	75	92
Paperwork/Process/ Info Collection (tax compliance)	189		218	129	190	195	160	159
Totals	543	647	668	843	954	1,113	1,752	2,029
Totals, converted to 2013 dollars		1,019.03	1,052.10	1,142.27	1,292.67			

Sources: Thomas D. Hopkins, "Costs of Regulation: Filling the Gaps, Report prepared for the Regulatory Information Service Center," Washington, D.C., August 1992, <http://www.thecre.com/pdf/COST%20OF%20REGULATION%20FILLING%20THE%20GAPS.pdf>; General Accountability Office, Briefing Report to the Ranking Minority Member, Committee on Governmental Affairs, U.S. Senate, Regulatory Reform: Information on Costs, Cost Effectiveness, and Mandated Deadlines for Regulations, (GAO/PEMD 95-18BR), March 1995, <http://archive.gao.gov/t2pbat/1/153774.pdf>; Thomas D. Hopkins, "The Changing Burden of Regulation, Paperwork, and Tax Compliance on Small Business: A Report to Congress," Office of the Chief Counsel for Advocacy, U.S. Small Business Administration, Washington, D.C., October 1995, [http://www.sba.gov/advo/laws/archive/law\\_brd.html](http://www.sba.gov/advo/laws/archive/law_brd.html); W. Mark Crain and Thomas D. Hopkins, "The Impact of Regulatory Costs on Small Firms," report prepared for the Small Business Administration, Office of Advocacy, RFP No. SBAHQ-00-R-0027, October 2001, <http://www.sba.gov/advo/research/rs207tot.pdf>; Office of Management and Budget, "Draft Report to Congress on the Costs and Benefits of Federal Regulations," Federal Register, March 28, 2002, pp. 15037-15038, <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/cbreport.pdf>; W. Mark Crain, "The Impact of Regulatory Costs on Small Firms," report prepared for the Small Business Administration, Office of Advocacy, Contract No. SBHQ-03-M-0522, September 2005, <https://www.sba.gov/sites/default/files/2016/09/05/sba-hq-03-m-0522.pdf>; Nicole V. Crain and W. Mark Crain, "The Impact of Regulatory Costs on Small Firms," report prepared for the Small Business Administration, Office of Advocacy, Contract No. SBAHQ-08-M-0466, September 2010, <http://www.sba.gov/advo/research/rs371tot.pdf>; Nicole V. Crain and W. Mark Crain, "The Impact of Regulatory Costs on Small Firms," report prepared for the Small Business Administration, Office of Advocacy, Contract No. SBAHQ-08-M-0466, September 2010, <http://www.sba.gov/advo/research/rs371tot.pdf>; Nicole V. Crain and W. Mark Crain, "The Impact of Regulatory Costs on Small Firms," report prepared for the Small Business Administration, Office of Advocacy, Contract No. SBAHQ-08-M-0466, September 2010, <http://www.sba.gov/advo/research/rs371tot.pdf>; National Association of Manufacturers, "The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business," W. Mark Crain and Nicole V. Crain, September 10, 2014, <http://www.nam.org/~media/A7A8456F33484E498F40CB46D6167F31.aspx>. Some figures here are adjusted to 2016 by the change in the consumer price index between 2001 and 2016, derived from "CPI Detailed Report Data for January 2017," Bureau of Labor Statistics, Washington, D.C. (Table 24. Historical Consumer Price Index for All Urban Consumers (CPI-U), U.S. city average, all items), <http://www.bls.gov/cpi/cpi1404.pdf>.

Table 4. Regulatory Costs in Small, Medium, and Large Firms, 2012

	Cost per Employee for All Business Types			
	All Firms	< 50 Employees	50–99 Employees	> 100 Employees
All Federal Regulations	\$9,991	\$11,724	\$10,664	\$9,083
Economic	\$6,381	\$5,662	\$7,464	\$6,728
Environmental	\$1,889	\$3,574	\$1,338	\$1,014
Tax Compliance	\$960	\$1,518	\$1,053	\$694
Occupational/Homeland Security	\$761	\$970	\$809	\$647

Source: W. Mark Crain and Nicole V. Crain, “The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business,” National Association of Manufacturers, September 10, 2014, <http://www.nam.org/~/media/A7A8456F33484E498F40CB46D6167F31.ashx>.

Some have set out to examine how seemingly inconsequential regulations accumulate and generate unintended effects and costs.<sup>515</sup> A 2016 report—“The Cumulative Cost of Regulations” by the Mercatus Center at George Mason University—employs a microeconomic model to determine “how much regulation distorts the investment decisions of firms and thus hampers long-run economic growth.” Using a 22-industry data set covering 1977 through 2012, the report concluded that, had regulatory burdens remained constant since 1980, the 2012 U.S. economy would have been 25 percent larger. Put another way, the 2012 U.S. economy was \$4 trillion smaller than it would have been in the absence of cumulative regulatory growth since 1980.<sup>516</sup> That represents a loss in real income of approximately \$13,000 per American per year.<sup>517</sup>

Based on existing and available sources, this report uses a baseline for across-the-board costs of federal regulation and intervention of \$1.9 trillion annually in compliance costs, economic and GDP losses, and social costs (see Figure 1).<sup>518</sup> This placeholder estimate is based on a nonscientific, disclaimer-laden, amalgam of GDP losses and compliance costs derived from available official data and the other available sources.<sup>519</sup> Even so, this assessment is more representative and inclusive than official estimates and more “conservative” in that burdens are conceivably considerably more, as the Mercatus and Dawson and Seater approaches imply. While it speaks to the kinds of unfathomed costs detailed in Box 3, it does not quantify them.

While Trump claimed to have saved hundreds of billions in regulatory costs in areas like fuel economy, health care, and telecom regulation, he also added significant categories of regulation, including those in response to the COVID-19 crisis. His vast increase in spending compounded the resulting regulatory distortions. As Box 3 illustrates, enormous costs simply never find their way into regulatory analyses or public disclosure.

Regarding regulations’ unequal effects on different kinds of firms, the NAM model noted above found overall annual per-employee regulatory costs to firms of \$9,991 on average, but those vary by firm size.<sup>520</sup> Table 4 shows that per-employee regulatory costs for firms with fewer than 50 workers can be 29 percent greater than those for larger firms—\$11,724 for smaller firms, compared with \$9,083 for larger ones.<sup>521</sup>

The SBA and earlier OMB surveys had traditionally conveyed regulatory costs in the following categories:

- Economic regulatory costs (for example, market entry restrictions and transfer payments such as price supports)
- Workplace regulatory costs
- Environmental regulatory costs
- Paperwork costs

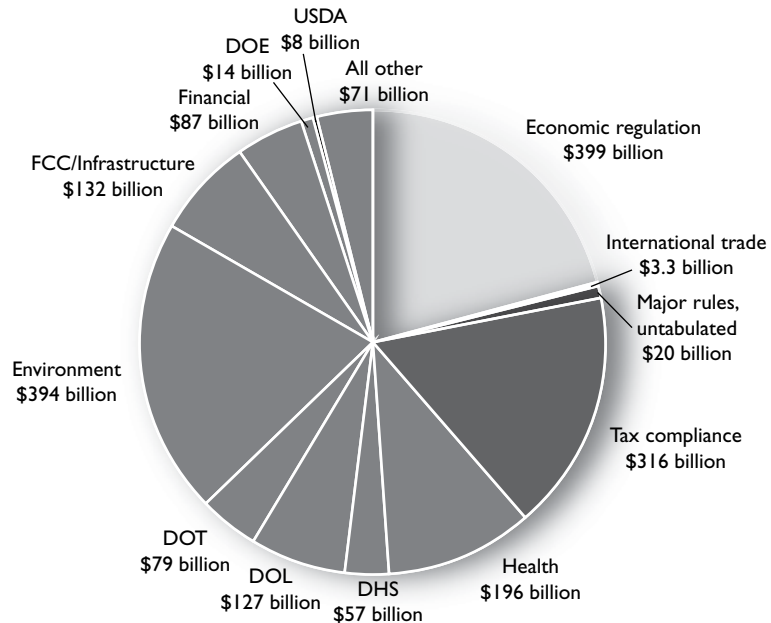
However, they do not capture numerous other categories of costs, such as the costs of antitrust prosecutions and the distortions they have inflicted over the past century.<sup>522</sup> Others include costs imposed by common-carriage telecom

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*Enormous costs simply never find their way into regulatory analyses or public disclosure.*

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Figure I. Annual Cost of Federal Regulation and Intervention,  
2021 Placeholder Estimate, \$1.9 Trillion



Source: Clyde Wayne Crews, Jr., *Tip of the Costberg: On the Invalidity of All Cost of Regulation Estimates and the Need to Compile Them Anyway*, 2017 ed., <http://ssrn.com/abstract=2502883>.

DHS = Department of Homeland Security; DOE = Department of Education; DOL = Department of Labor; DOT = Department of Transportation; FCC = Federal Communications Commission; USDA = U.S. Department of Agriculture.

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**We need greater  
acknowledgment  
of the costs we do  
not know.**

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network regulations that undermine property rights, federal health care spending, the predominance of public-private partnerships rather than private enterprise in large-scale infrastructure projects, resource-use restrictions on western lands, the reluctance to move the electromagnetic spectrum into private hands, a “too big to fail” stance toward large financial institutions, the permanent war economy, surveillance of private citizens, overcriminalization, monopolization of airport security, influence in the housing market and financing, and much more. The overarching cost is the overthrow of the constitutional order in favor of rule by unelected bureaucrats.

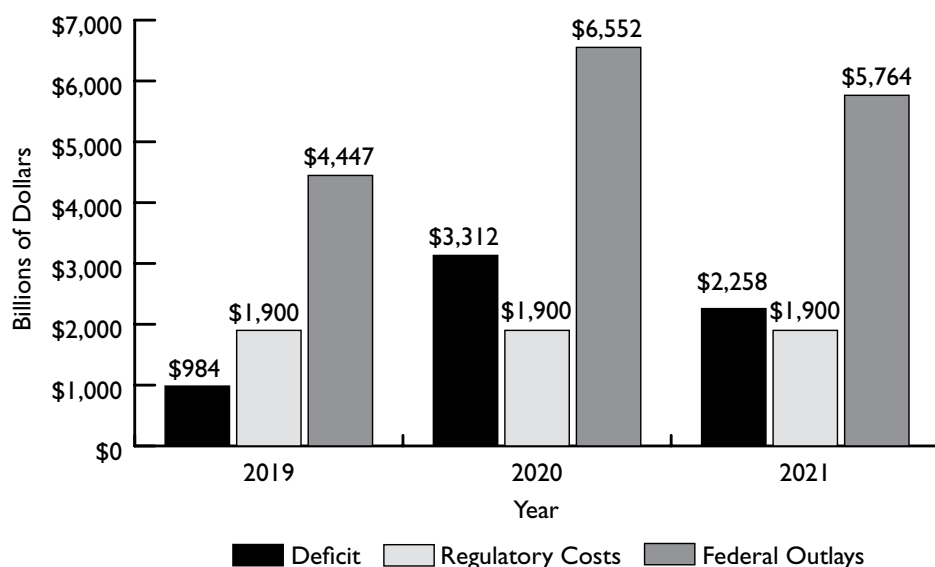
We need greater acknowledgment of the costs we do not know. With regard to the mechanics of disclosure, the debate has never been over whether the government should perform its cost assessment, but whether it should be bottom-up or top-down.<sup>523</sup> The answer is that both approaches are needed.

## Regulatory Cost Burdens Compared with Federal Spending and the Deficit

Comparisons of regulation with the costs of federal taxation and spending help place the relative magnitudes in perspective, but the calculus changes with the surge in COVID-related spending and regulation. The first-ever trillion-dollar budget occurred in the latter half of the 1980s; now, deficits dwarfing that are projected with no end in sight, and the situation cannot be blamed on the COVID response.<sup>524</sup>

The U.S. federal government posted \$6.552 trillion in outlays and a deficit of \$3.132 trillion in FY 2020, up from \$4.447 trillion in outlays and a deficit of \$984 billion in pre-COVID FY 2019.<sup>525</sup> In the Congressional Budget Office’s new *Budget and Economic Outlook*, trillion-dollar deficits continue

**Figure 2. Federal Outlays and Deficits Compared with Federal Regulatory Costs (2019, 2020, and Projected 2021)**



Sources: Deficit and outlays and projected outlays from Congressional Budget Office, *The Budget and Economic Outlook*, Table 1-1, “CBO’s Baseline Budget Projections, by Category,” various years, <https://www.cbo.gov>. Deficit and outlays also from White House Office of Management and Budget, Historical Tables, Table 1.1—Summary of Receipts, Outlays, and Surpluses or Deficits (-): 1789–present, <https://www.whitehouse.gov/omb/historical-tables/>. Regulatory cost estimate from Crews, *Tip of the Costberg*.

Federal deficit and outlay numbers are by fiscal year; regulatory costs by calendar year.

every year through 2031, at which point the projection reaches \$1.883 trillion.<sup>526</sup>

Figure 2 compares deficits and outlays for fiscal years 2019 and 2020 and projected amounts for 2021. Where costs of regulation have tended to hover around 40 percent of outlays, the rocketing spending in 2020 resulted in regulatory compliance costs of about 29 percent of budget outlays of \$6.552 trillion. We now find the deficit some 65 percent larger than the placeholder estimate for total federal regulatory costs.

## Regulatory Costs Compared with Income Taxes and Corporate Profits

Regulatory costs easily rival revenues from individual income taxes and corporate taxes combined. As Figure 3 shows, regulatory costs surpass 2020 estimated individual income tax revenues of \$1.812 trillion.<sup>527</sup> Corporate

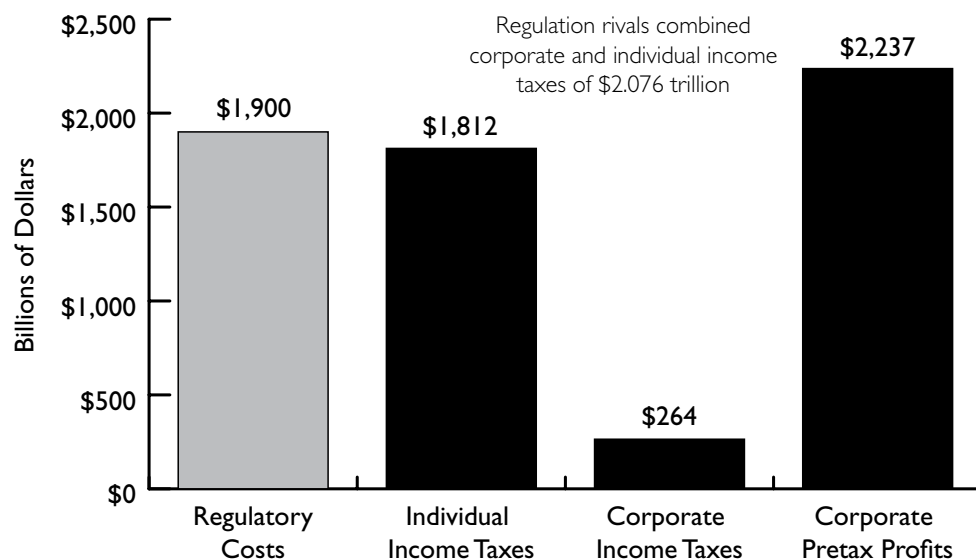
income taxes collected by the U.S. government—an estimated \$264 billion for 2020—are dwarfed by regulatory costs.<sup>528</sup> The sum of the two—\$2.076 trillion—is rivaled by our regulatory cost marker of \$1.9 trillion. Regulatory costs as depicted here also approach the level of pretax corporate profits, which were \$2.237 trillion in 2019.<sup>529</sup>

## Regulatory Costs Compared with GDP

In December 2020, the Commerce Department’s Bureau of Economic Analysis estimated U.S. current-dollar GDP for 2020 at \$21.17 trillion.<sup>530</sup> The total regulatory cost figure of \$1.9 trillion annually is equivalent to approximately 9 percent of that amount (as noted, other considerations could take that sum far higher). Combining regulatory costs with federal FY 2020 outlays of \$6.552 trillion (see Figure 2), the federal government’s share of the economy reached \$8.45 trillion in



**Figure 3. Regulatory Compliance Compared with Individual Income Taxes, Corporate Income Taxes, and Corporate Pretax Profits**



Sources: Regulatory cost estimate from Crews, *Tip of the Costberg*. 2020 tax figures from OMB, Historical Tables, Table 2.1, "Receipts by Source," <http://www.whitehouse.gov/omb/historical-tables>. 2019 corporate pretax profits (domestic and international) from Bureau of Economic Analysis, *National Income and Product Accounts Tables*, Table 6.17D, "Corporate Profits before Tax by Industry."

2020, or roughly 40 percent of GDP, compared with the stubborn longstanding annual combined figure of approximately 30 percent (see Figure 4). That does not include state and local spending and regulation.

veys of global economic freedom. Figure 6 depicts the 2019 GDPs of the countries common to the top 10 in both the Heritage Foundation *Index of Economic Freedom* and the Fraser Institute/Cato Institute *Economic Freedom of the World* report.<sup>532</sup> The United States ranks 17th and sixth in those reports, respectively.

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*If U.S. regulatory costs of \$1.9 trillion were a country, it would be the world's eighth-largest economy.*

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### U.S. Regulation Compared with Some of the World's Largest and Freest Economies

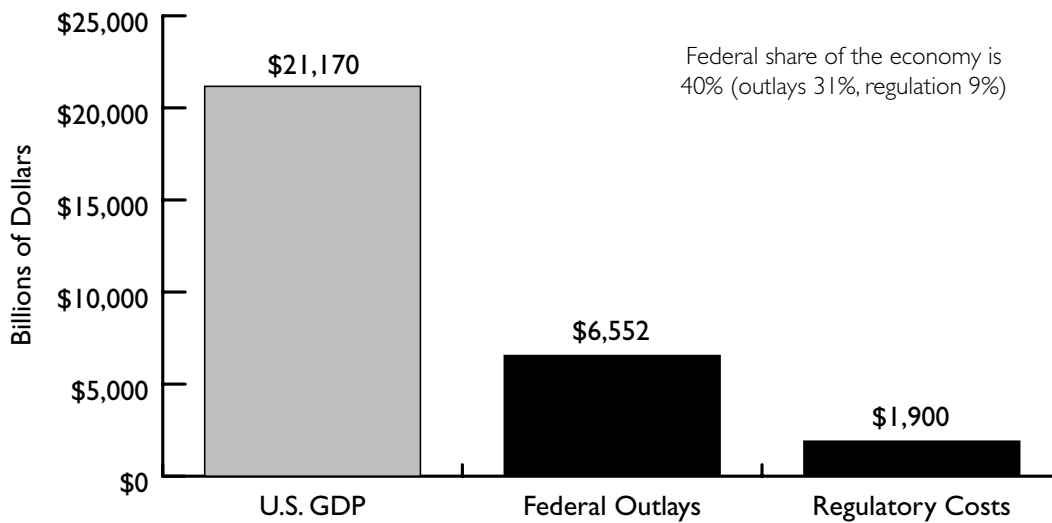
Not counting the United States, only seven countries have GDPs that exceed the cost burden of U.S. regulation. U.S. regulatory costs surpass the 2019 GDP of neighbors Canada, at \$1.7 trillion, and Mexico, at \$1.3 trillion. If U.S. regulatory costs of \$1.9 trillion were a country, it would be the world's eighth-largest economy, ranking behind Italy and ahead of Brazil (see Figure 5).<sup>531</sup>

The U.S. regulatory figure of \$1.9 trillion exceeds the output of many of the world's major economies, including those ranked as the freest economically by two prominent annual sur-

### Regulation: A Hidden Tax on the Family Budget

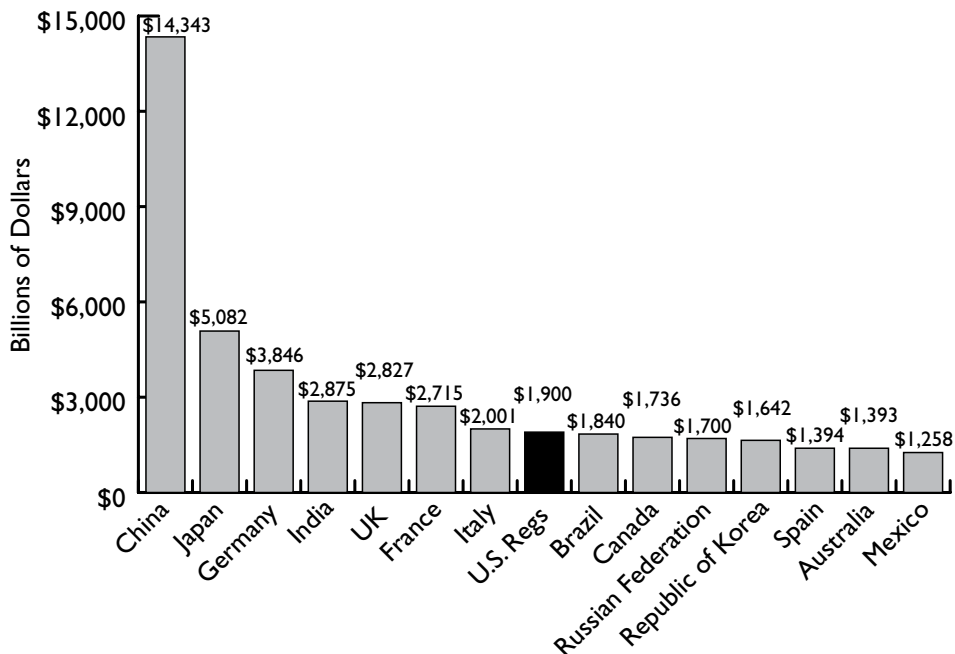
The pain of taxes can seem more immediate and present than that of regulation, but, like the taxes they are required to pay, businesses will pass some regulatory costs on to consumers. Other costs will find their way to workers and investors in regulated companies. By assuming a full pass-through of all such costs to consumers—many consumers are also workers and owners through stock and mutual fund holdings—we can look at the share of each household's regulatory costs and compare it with total annual expenditures as compiled by the Depart-

Figure 4. GDP Compared to Federal Outlays and Regulation



Sources: Crews, *Tip of the Costberg*. GDP from U.S. Department of Commerce, Bureau of Economic Analysis. Outlays from CBO and/or White House OMB.

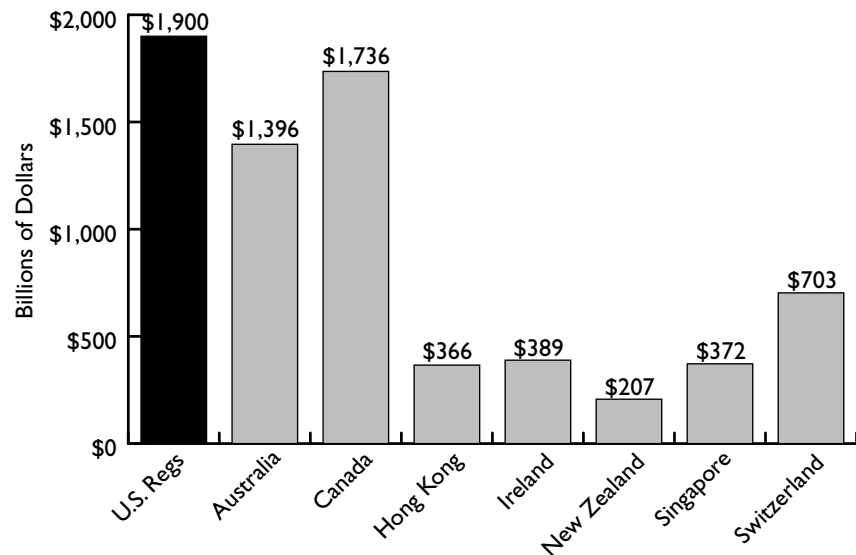
Figure 5. U.S. Regulatory Costs Compared to 2019 Gross Domestic Product of the World's Largest Economies



Sources: Crews, *Tip of the Costberg*. Gross Domestic Product data from World Bank, Washington, D.C., GDP Data, <http://data.worldbank.org/indicator/NY.GDPMKTP.CD/countries> and <https://databank.worldbank.org/data/download/GDP.pdf>.

U.S. 2019 GDP of \$21,428 billion per World Bank not shown.

Figure 6. U.S. Regulatory Load Compared to 2019 Gross Domestic Product in World Economies Regarded as Most Free



Sources: Crews, *Tip of the Costberg*. Gross Domestic Product data from World Bank, Washington, D.C., GDP Data, <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD/countries>.

“Free” economies consist of those in the top 10 of both the Heritage Foundation/*Wall Street Journal* Index of Economic Freedom and the Fraser Institute/Cato Institute *Economic Freedom of the World* reports.

ment of Labor’s Bureau of Labor Statistics (BLS).<sup>533</sup>

For America’s 132.2 million households, or “consumer units” in BLS parlance, the average 2019 pretax income was \$82,852.<sup>534</sup> If one were to allocate annual regulatory costs assuming, for simplicity’s sake, a full pass-through of costs to consumers, U.S. households “pay” \$14,368 annually in embedded regulatory costs (\$1.9 trillion in regulation divided by 132,242,000 “consumer units”), or 17 percent of average income before taxes, and more as a share of after-tax income. This regulatory “hidden tax” exceeds every annual household budgetary expenditure item except housing (see Figure 7). Regulatory costs amount to up to 24 percent of the typical household’s expenditure budget of \$63,036. The average U.S. household “spends” more on hidden regulation than on health care, food, transportation, entertainment, apparel, services, or savings. Of course, some costs of regulation are not hidden. Consumers pay for regulatory agencies and administration more directly through taxes, as described in the next section.

## Administrative and Enforcement Costs of Regulation

Regulatory cost estimates attempt to capture compliance, deadweight, and other costs experienced by the public, but those evaluations do not generally include administrative costs—the on-budget amounts spent by federal agencies to issue and enforce rules. The Weidenbaum Center at Washington University in St. Louis and the George Washington University Regulatory Studies Center regularly examine presidents’ annual budget proposals to compile the administrative costs of developing and enforcing rules. Those amounts—funds that taxpayers contribute to support agencies’ administrative operations—are disclosed in the federal budget in a way that regulatory compliance and economic costs are not.

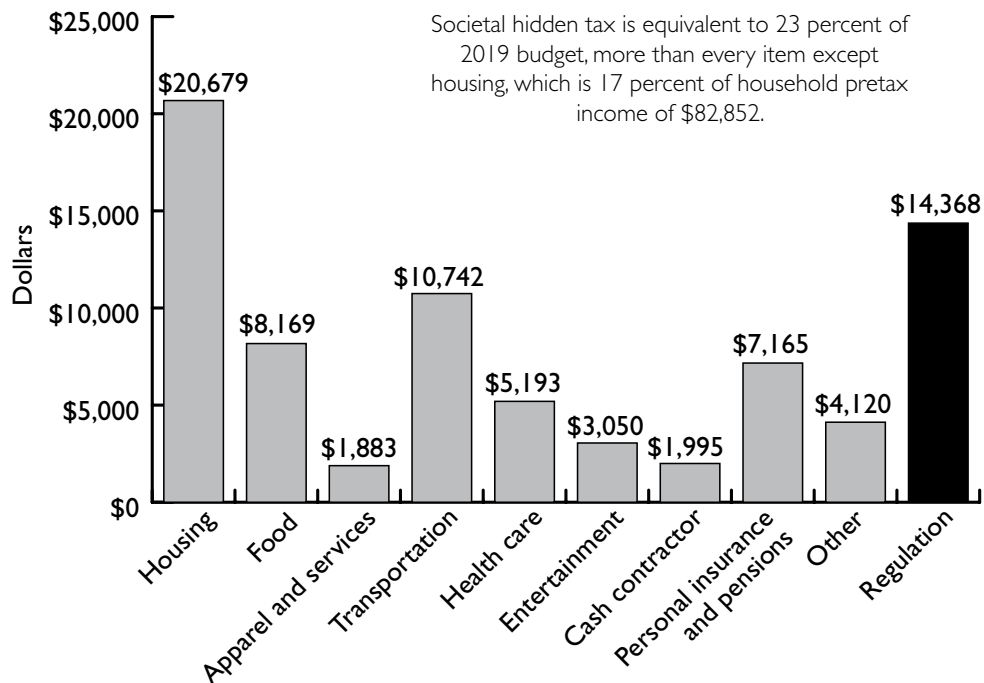
According to the latest compilation, FY 2020 enforcement costs incurred by federal departments and agencies stood at almost \$78 billion (in constant 2020 dollars, adjusted from original 2012 dollars) (Figure 8).<sup>535</sup> Of that

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*The average U.S. household “spends” more on hidden regulation than on health care, food, transportation, entertainment, apparel, services, or savings.*

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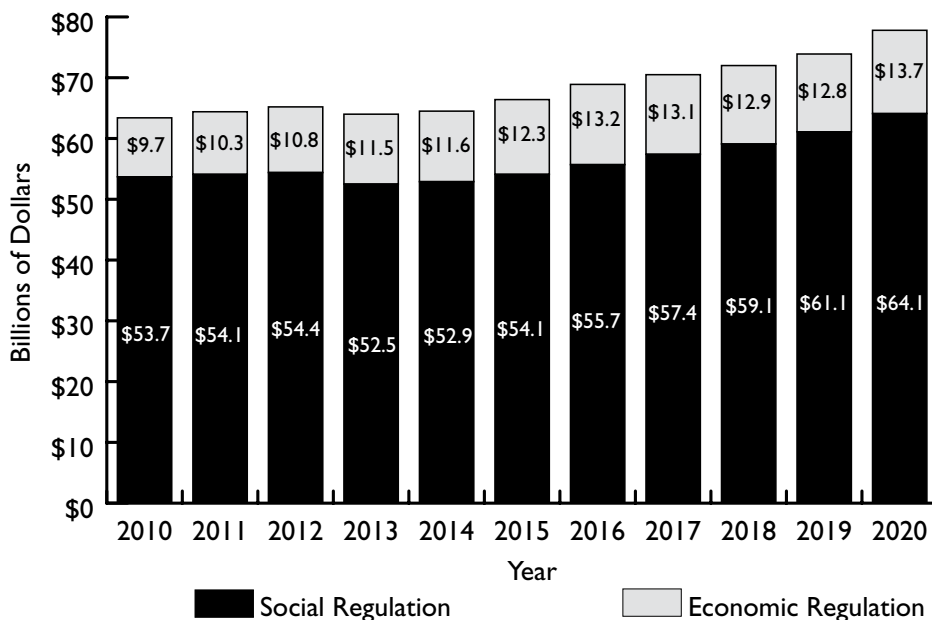
**Figure 7. The U.S. Household Expense Budget of \$63,036 Compared to Regulatory Costs**



Sources: Bureau of Labor Statistics, author calculations.

Proxy for households here is BLS depiction of 132,242,000 “consumer units,” which comprise “families, single persons living alone or sharing a household with others but who are financially independent, or two or more persons living together who share expenses.” Other consists of “personal care products and services,” “education,” and “all other expenditures.”

**Figure 8. Federal Agency Administrative and Enforcement Budgets, \$78 Billion Total in FY 2020**



Source: Annual “Regulators’ Budget” Series, published jointly by the Regulatory Studies Center at The George Washington University and the Weidenbaum Center on the Economy, Government, and Public Policy.

Original 2012 constant dollars are adjusted here by the change in the consumer price index between 2012 and 2020, derived from Consumer Price Index tables, U.S. Department of Labor, Bureau of Labor Statistics, Washington, D.C. All Urban Consumers (CPI-U), U.S. city average, all items.

amount, \$13.7 billion was incurred on administering economic regulations. The larger amount, spent on writing and enforcing social and environmental regulations, was \$64.1 billion. The \$78 billion in regulatory agency enforcement costs helps complete a picture of the federal regulatory apparatus, as these costs come on top of other estimates of regulatory compliance and economic burdens. In current dollars, the EPA alone spent an estimated \$5.561 billion in this category in 2020, accounting for 7 percent of total expected expenditures by all regulatory agencies.<sup>536</sup> The EPA formerly accounted for the lion's share of government administration and enforcement costs, but the Department of Homeland Security's costs, at an estimated \$38 billion, now accounts for 48 percent.<sup>537</sup>

The Weidenbaum Center and the Regulatory Studies Center also estimate the number of full-time-equivalent administrative and enforcement staff at 288,409 in FY 2021. The number of federal employees has increased by more than 100,000 since the 2001 staffing level of 173,057.<sup>538</sup> Much of the post-2001 surge may be attributable to the then-newly created Transportation Security Administration's hiring of thousands of airport screening personnel.

Costs are one way to attempt to capture the size and scope of the federal regulatory enterprise. Another is to assess the paper production—the regulatory material that agencies publish each year in sources like the *Federal Register*.

# Tens of Thousands of Pages and Rules in the *Federal Register*

The *Federal Register* is the daily repository of all proposed and final federal rules and regulations.<sup>539</sup> Although its number of pages is often cited as a measure of regulation's scope, there are grave problems with relying on page counts. A short rule may be costly and a lengthy one may be relatively cheap. The *Federal Register* also contains many administrative notices, corrections, rules relating to the governance of federal programs and budgets, presidential statements, and other material. They all contribute bulk and bear some relation to the flow of regulation, but they are not strictly regulations. Blank pages, skips, and corrections also affect page counts. In previous decades, blank pages numbered into the thousands owing to the Government Publishing Office's imperfect estimation of the number of pages that agencies would require.

With regard to Trump's one-in, two-out agenda, one cannot easily look at the *Federal Register* and get a sense of what rules were cut. Moreover, a rule that some see as deregulatory, others may see as regulatory. While the *Register* has always been treated as a document cataloging regulations, it has recently chronicled their reduction, although a look at the daily *Federal Register* may not give that impression. Reducing regulations can make the *Federal Register* grow rather than shrink. Shortcomings notwithstanding, it is worthwhile to track the *Federal Register*'s page counts.

## **Federal Register Pages Up 41 Percent between Trump Years One and Four**

The first calendar year of the Trump administration finished with 61,308 pages in the

*Federal Register* (see Figure 9). The last time the annual page count had been that low was in 1993, at 61,166 pages, during the Clinton administration.

The 2017 count also contains three weeks of Obama administration output. By the time Trump was inaugurated on January 20, 2017, the Obama administration had already added 7,630 pages to the *Federal Register*, making Trump's "net" page count 53,678.<sup>540</sup> The new 2020 tally of 86,356 pages is a striking 41 percent above Trump's first-year count.

For comparison, at the end of 2016, Obama's final calendar year, the number of *Federal Register* pages stood at 95,854, which was the highest level in the history of the *Federal Register*, and a 19 percent jump over Obama's own second-to-last year's count. Trump's 2017 count was 36 percent below that Obama record. The last time a drop in *Federal Register* page counts of the Trump magnitude happened was when Ronald Reagan reduced the count from Jimmy Carter's 73,258 in 1980 to 44,812 by 1986, but that 28,446-page drop took five years to materialize.<sup>541</sup>

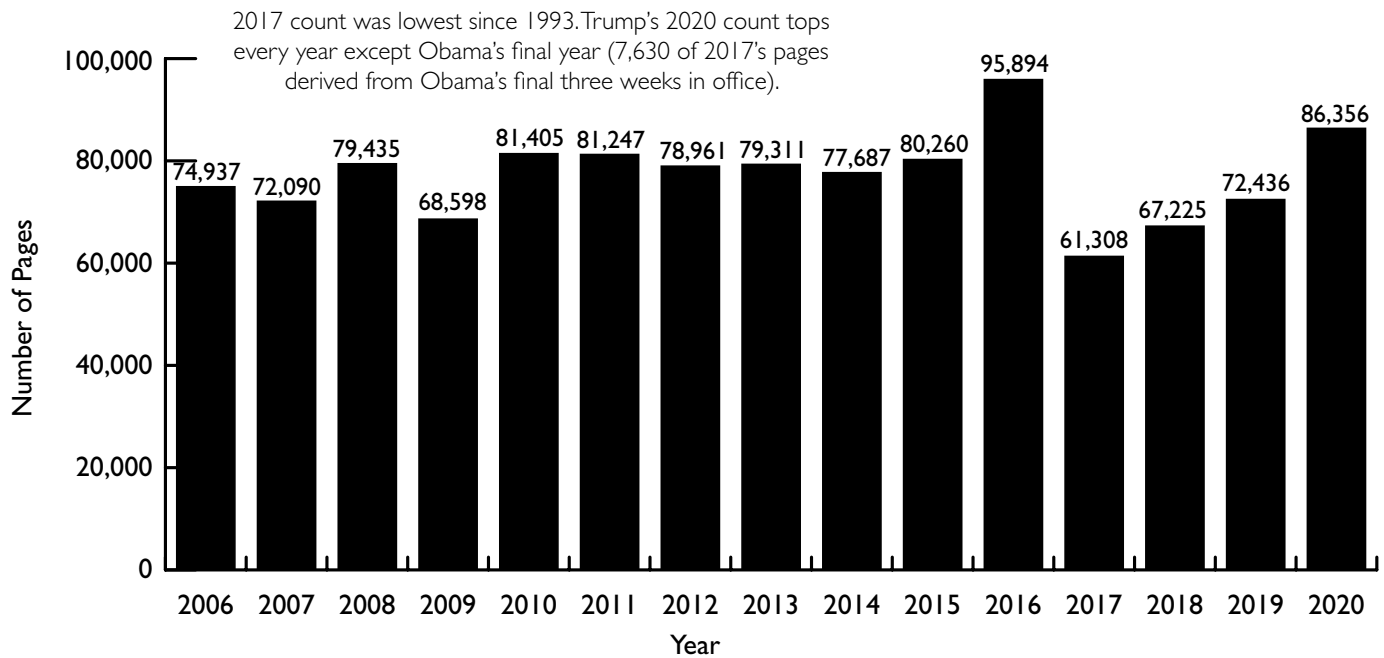
Trump's 2020 *Federal Register* page count of 86,356 is a mere 10 percent below Obama's record and the second-highest count ever. The ballooning in the *Register* under Trump highlights the problems with employing it as a metric. Offsetting the typical implication that an increase in *Federal Register* pages implies an increase in regulation, it is the case that to eliminate a rule, agencies need to overwrite it with another rule. Figure 9 captures the prior all-time record years of 2010

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*A short rule may be costly and a lengthy one may be relatively cheap.*

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**Figure 9. Number of *Federal Register* Pages, 2006–2020**



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

and 2011, at 81,405 and 81,247, respectively. Of the 10 all-time high *Federal Register* page counts, six occurred during the Obama administration. (For a history of *Federal Register* page totals since 1936, see Appendix: Historical Tables, Part A.)

### ***Federal Register* Pages Devoted to Final Rules**

Isolating the pages devoted to *final* rules might be more informative than gross page counts, since doing so omits pages dedicated to proposed rules, agency notices, corrections, and presidential documents (although those can have regulatory effects, too).

The number of pages devoted to final rules in 2018 stood at 16,378, the lowest count since 1992. In contrast, Trump's final year set the second-highest count of all time at 32,223. Nonetheless, apart from the astonishing 55 percent jump between 2019 and 2020, two things stand out in Figure 10.

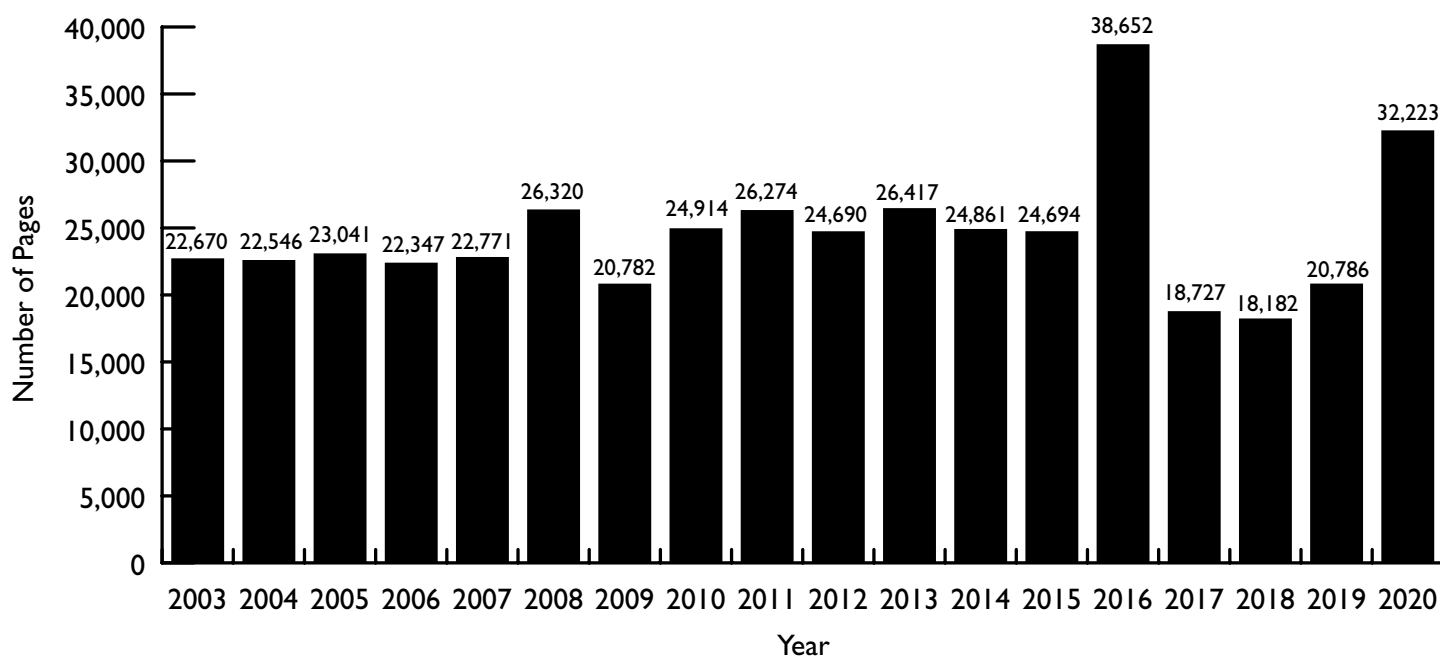
First is the 56 percent jump between 2015 to 2016 under Obama. Those spikes under both Obama and Trump are consistent with the longstanding bipartisan midnight rule tradition (arguably in part deregulatory, in Trump's case). Second was the notable drop of 51 percent between Obama and Trump. Obama's 2016 high was a record that shattered 2013's then peak of 26,417 by 46.3 percent.

Some rules are bulkier than others. The Safer Affordable Fuel-Efficient, or SAFE, Vehicles Rule for Model Years 2021–2026 alone clocked in at 1,105 pages.<sup>542</sup>

Although there are more relevant measures than page counts of final rules to account for actual effects or burdens, for page counts to drop so steeply between administrations, or to jump at transition time, is significant.

Relevant also to the discussion about monitoring future regulatory costs are the pages of proposed (as opposed to final) rules in the regulatory pipeline. These can be a leading indicator heralding growth or decline

Figure 10. *Federal Register* Pages Devoted to Final Rules, 2003–2020



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

in tomorrow's numbers of final rules. Pages devoted to proposed rules peaked at 23,193 in 2011, and Obama's final page count of proposed rules was 21,457 in 2016. Under Trump, *Federal Register* pages devoted to proposed rules in 2017 cratered to 10,892—half the level of Obama's concluding years, and the lowest since 1981. These rose to 17,246 in 2018. At the end of 2020, the number of that year's *Federal Register* pages devoted to proposed rules stood at 19,984. For comparison, all Obama years apart from the first exceeded 20,000.

prior decade had yielded 730,176 pages and an average of 73,018 pages per year. Trump's final year total was 87,012. Nonetheless, even with the page-count reduction during Trump's administration, page counts could easily top 1 million in the coming decade. That expectation is reinforced by the shift in federal regulatory policy asserted in President Joe Biden's "Modernizing Regulatory Review" directive<sup>543</sup> and his "climate crisis" regulatory campaign.<sup>544</sup>

### Federal Register Pages Published by Decade

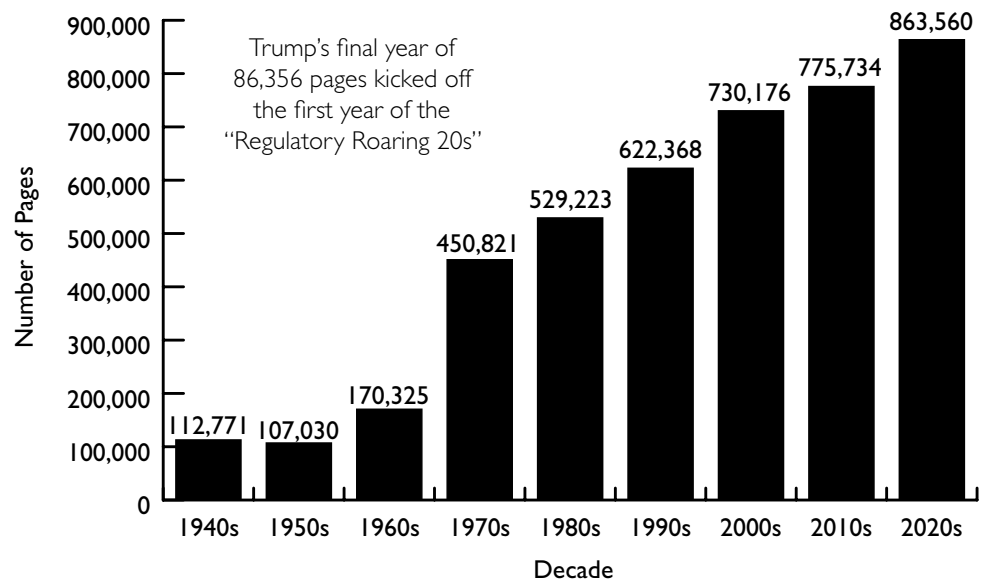
Still another way of looking at *Federal Register* trends is by pages per decade (see Figure 11). Even with Trump's reductions, a hefty jump over the prior decade is apparent. The second-to-last bar of Figure 11 shows that the just-ended decade of the 2010s saw 775,734 new *Federal Register* pages, for an average of 77,573 pages added per year. The

### Number of Final and Proposed Rules in the *Federal Register*

Despite the fattened 2020 *Federal Register*, the Trump administration managed to reduce the annual number of rulemakings in each of its four years to the lowest levels ever recorded. Even with Trump's record *Federal Register* page count upon exit, the 3,353 rules contained within were surpassed by every other president since records began being kept in the 1970s. And again, some of those Trump rules were deregulatory. The *Federal*



Figure 11. *Federal Register* Pages per Decade  
775,734 Pages Published in the 2010s



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

2000–2009 averaged 73,018 annual pages; 2010–2019 averaged 77,573 annual pages.

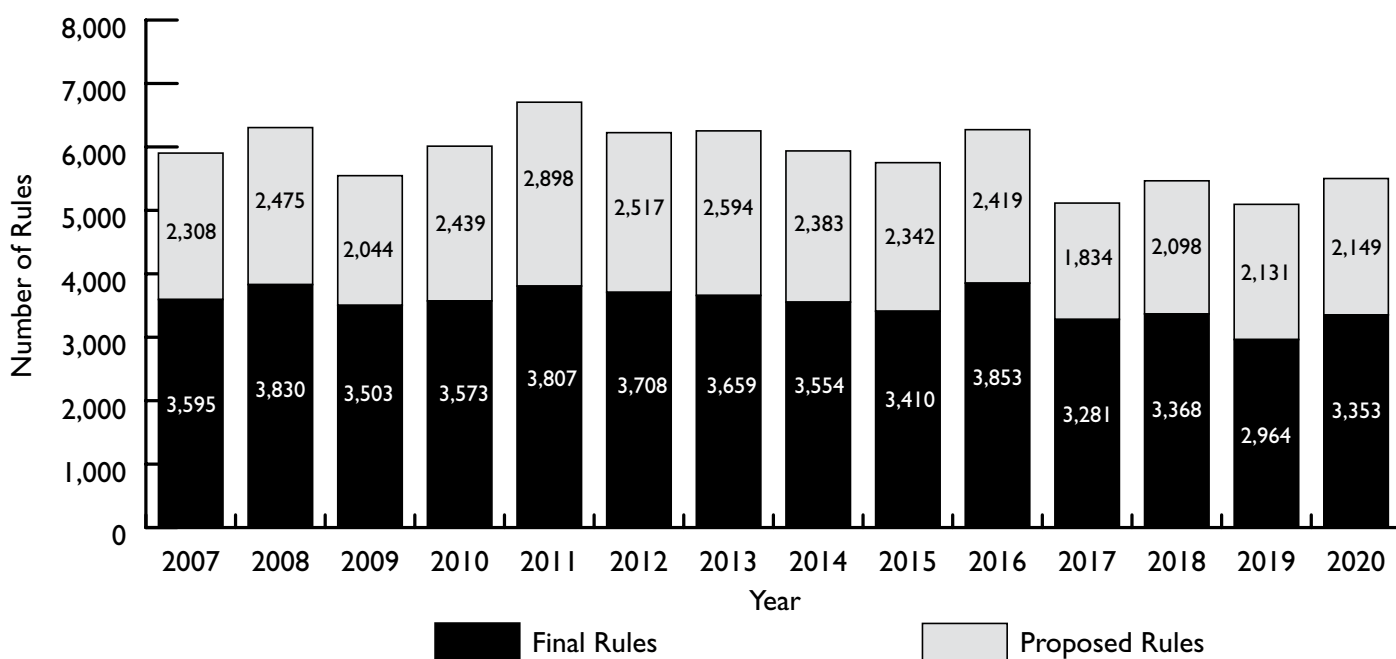
*Register* does not distinguish between regulatory and those intended to be deregulatory. Here, we assess them based on the Unified Agenda, but there is no direct mapping between the Agenda and the *Register* (which is one of many needed reforms).

This slowed pace of traditional rulemaking (as opposed to Trump’s sweeping impulses on antitrust, trade, tech policy, family leave social policy, and other areas that are not easily tracked in OMB reviews) was a major development defining the Trump administration. The 2,964 rules from Trump in 2019 made for the lowest count ever, and the only count below 3,000, since record keeping began in the 1970s. Trump’s final year of 2020 concluded with 3,353 rules (see Figure 12). Midnight rule flurry notwithstanding, Trump’s tally here is exceeded by all other presidents, so it remains one of the historically lowest. That low count can be said to be offset by the approximately 202 final rules attributable to Trump between New Year’s Day and Inauguration Day, January 20, 2021, but even some among those were deregulatory in nature.

In 2016, the final full year of the Obama administration, the number of final rules published in the *Federal Register* reached 3,853. That had been the highest total of the Obama administration and the highest level since 2005. Under Trump, final rules dipped to 3,281 in 2017, then the lowest count since records began being kept. Additionally, Obama issued 207 in January 2017 before Trump’s inauguration, which leaves Trump with a “net” of 3,074 for that year.<sup>545</sup> In 2018, Trump’s rule count bumped up to 3,368.<sup>546</sup> Of the aforementioned 2019 tally of 2,964 final rules, some were deregulatory in character, which implies even lower levels of finalized regulation.

The number of final rules being published in the current era is lower than it was throughout the 1990s, when the average annual total of final regulations was 4,596. The average for the period 2000–2009 was 3,948. Even Obama’s highest counts fell well below those levels. Of course, not all rules are created equal, and fewer of Obama’s rules would be expected to have been devoted to streamlining like Trump’s one-in, two-out direc-

Figure 12. Number of Proposed and Final Rules in the *Federal Register*, 2007–2020



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

tive. Note again that deregulatory actions by Trump that require notice and comment added to his final and proposed rule counts.

Rules deemed broadly “significant” warrant attention. They make up a broader classification than economically significant rules, defined as those deemed to impose \$100 million in annual costs.<sup>547</sup> Among Obama’s 3,853 final rules in 2016, 545 were deemed “significant” under Executive Order 12966, the highest count over the past two decades.<sup>548</sup> While several hundred “significant” final rules each year are common, that changed dramatically under the Trump administration. Trump issued 214 in 2017, 114 in 2018, 69 in 2019, and 79 in 2020, the lowest levels since 2006’s 179 significant final rules.<sup>549</sup>

More detailed analysis of proposed rules, on an ongoing basis, can add some clarity to future expected regulatory cost burdens. Stopping or slowing incomplete proposed rules in the pipeline is easily done, and all recent presidents have done so. And it is obviously easier than eliminating existing rules. It would be useful for the *Federal Register* to

flag which final and proposed rules are deregulatory as opposed to regulatory. This was done in the Unified Agenda under Trump, and it remains to be seen whether Biden continues this disclosure. That practice allows clearer analysis of both the routine and the significant among forthcoming rules, since the quantity of both can be a leading indicator of reductions or increases in final rules yet to come.

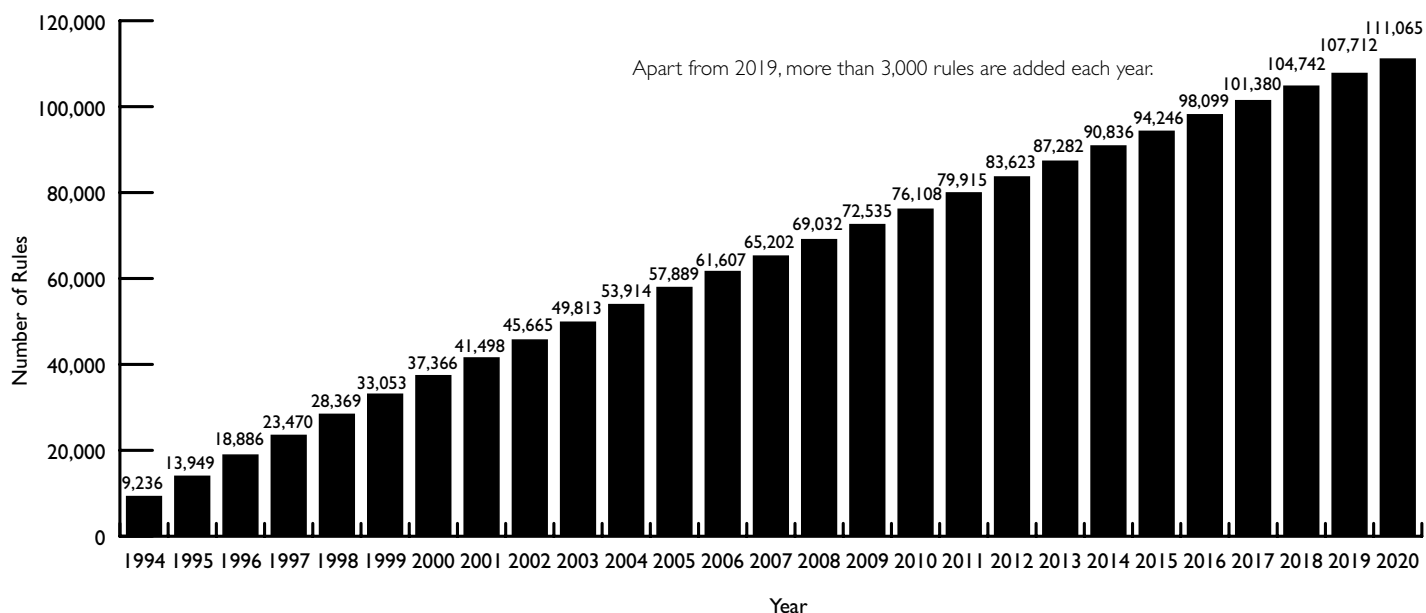
In Obama’s final year of 2016, 2,419 proposed rules appeared in the *Federal Register* (Figure 12). In Trump’s first year, the count fell to 1,834 (including the approximately 156 issued by Obama during the first three weeks of 2017), which remains the lowest count since record keeping began. Those rules stood at 2,098 in 2018, 2,131 in 2019, and 2,149 in 2020. Trump’s midnight rule activity notwithstanding, these levels of proposed rules never attained those of prior years (except for exceeding the 2009 Obama count of 2,044), although this final count is amplified by the approximately 90 proposed rules the Trump administration proffered before Inauguration Day 2021. Indeed, in the 1990s, much greater numbers of pro-

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*Stopping or slowing incomplete proposed rules in the pipeline is easily done, and all recent presidents have done so. And it is obviously easier than eliminating existing rules.*

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Figure 13. Accumulation of Final Rules Published in the *Federal Register*, 1994–2020



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

*The fact that records of proposed and final rules were not kept until the latter half of the 1970s is indicative of the need for greater accountability.*

posed rules appeared in the annual pipeline. (For the numbers of proposed and final rules and other documents issued in the *Federal Register* since 1976, see Appendix: Historical Tables, Part B.)

The fact that records of proposed and final rules were not kept until the latter half of the 1970s—three decades after the Administrative Procedure Act became law—is indicative of the need for greater accountability for the administrative state.

### Cumulative Final Rules in the *Federal Register*

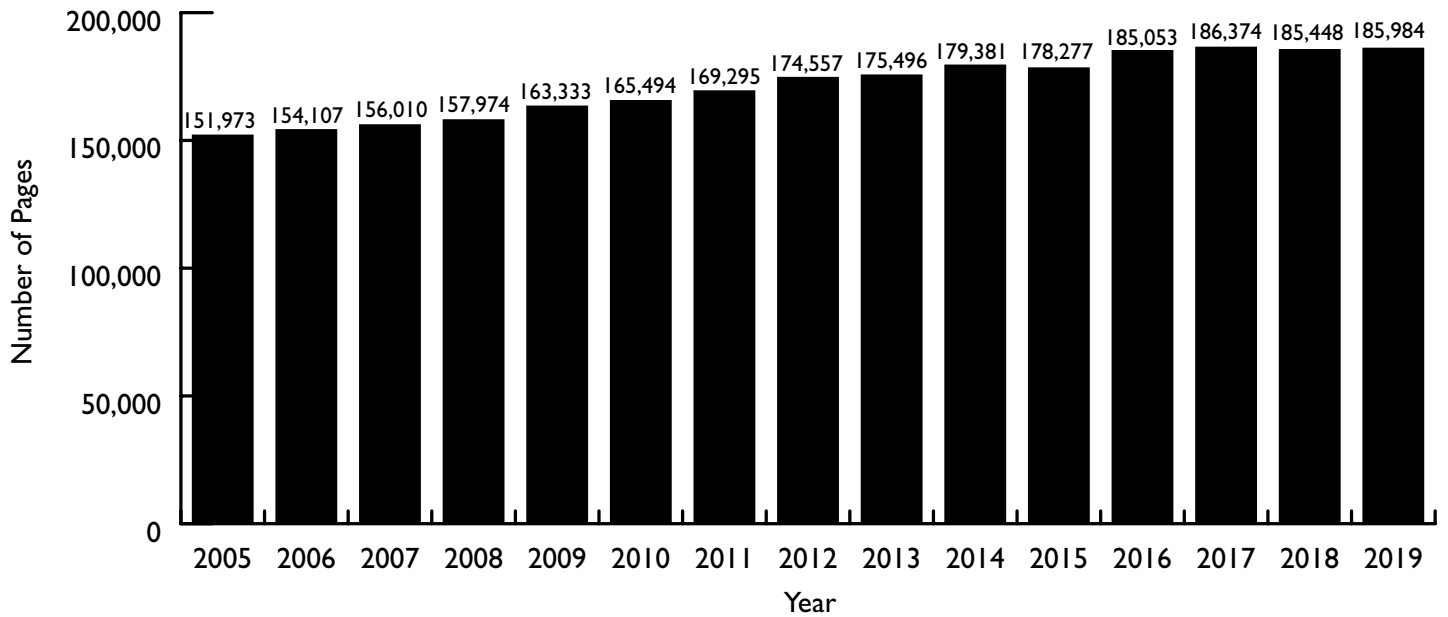
As noted, Trump’s 2019 final rule count of 2,964 is the only one ever below 3,000. The annual outflow of over 3,000 final rules has resulted in the issuance of 111,065 rules since 1993—when the first edition of *Ten Thousand Commandments* was published—through the end of 2020 (see Figure 13). In 1976, when the *Federal Register* first began itemizing them, 208,155 rules have been is-

sued (see Appendix: Historical Tables, Part B). Since 1996, the year the Congressional Review Act was passed, 92,179 rules have been issued. The 16 rules repealed by CRA resolutions represent 0.017 percent of that.

### The Expanding Code of Federal Regulations

The page count for final rules in the *Code of Federal Regulations* (CFR) is not as dramatic as the yearly count of tens of thousands of pages in the *Federal Register*, but it is still considerable. In 1960, the CFR contained 22,877 pages. Since 1975 until the end of 2019, its total page count had grown from 71,224 to 185,984, including the index—a 161 percent increase. The number of CFR bound volumes stands at 242 for the past four years, compared with 133 in 1975. (See Figure 14. For the detailed breakdown numbers of pages and volumes in the CFR since 1975, see Appendix: Historical Tables, Part C.)

Figure 14. *Code of Federal Regulations*, 185,984 Total Pages in 2019, 2005–2019



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

As noted, in recent years, traditional rules and regulations have been supplemented in significant part by various forms of executive actions and regulatory guidance documents. Those are important to track, but there is no CFR-style repository for them. Trump's Ex-

ecutive Order 13981, "Promoting the Rule of Law through Improved Agency Guidance Documents," in 2020 began the process of creating an inventory, but Biden interrupted that effort.<sup>550</sup>

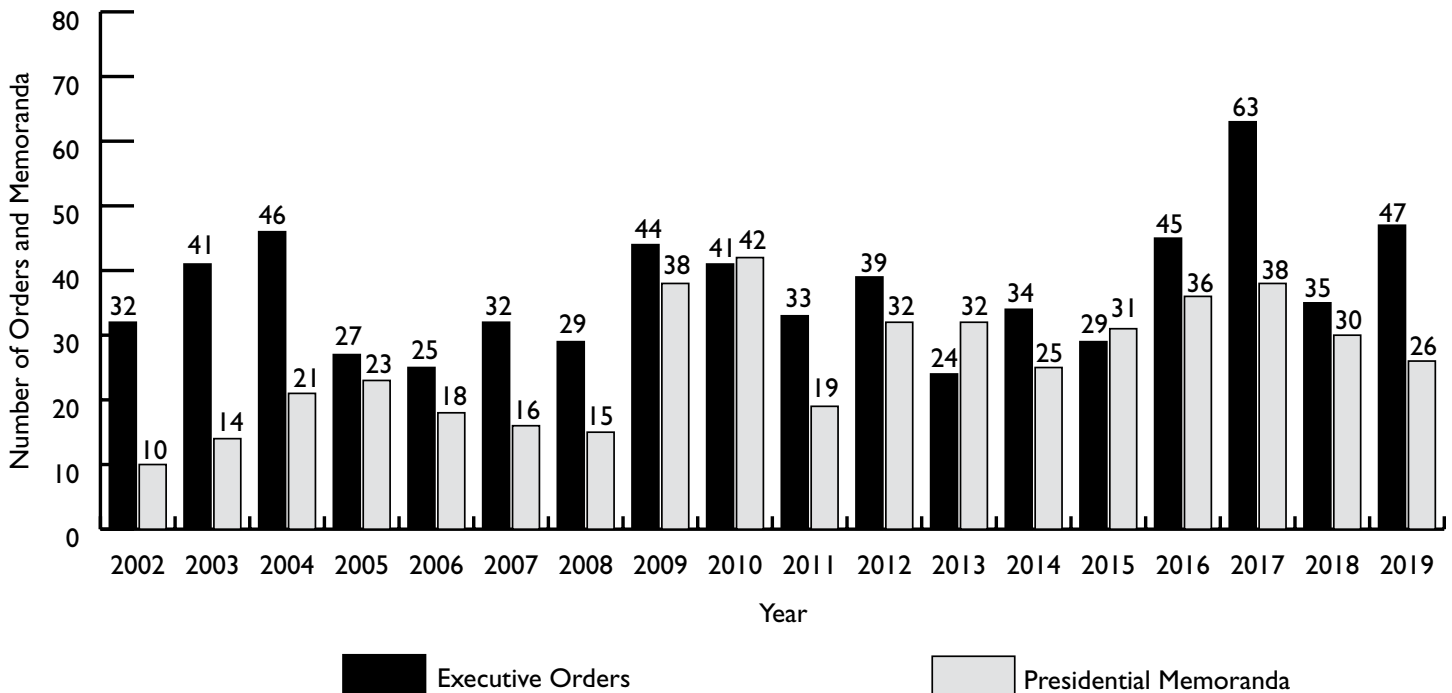
# The Presidential Dimension of Regulatory Dark Matter: Executive Orders and Memoranda

Executive orders, presidential memoranda, and other executive actions make up a large component of executive “lawmaking.” They merit attention from lawmakers, since they can have, or appear to have, binding effect.<sup>551</sup>

Executive orders ostensibly deal with the internal workings and operations of the federal government, and presidents have traditionally been presumed able to overturn those issued by their predecessors. Their use is not new, dating back to President George Washington’s administration.<sup>552</sup> However, their reporting and numbering have not

been consistent until recent decades. President Obama’s executive order totals, “pen and phone” notwithstanding, were not high compared with those of other presidents. At the end of his term, Obama had issued 276 executive orders, whereas President George W. Bush’s final tally was 291, and that of President Bill Clinton was 364 (see Table 4 and Figure 15). Trump issued 69 executive orders in 2020, the highest level in 25 years. That number outstrips anything since Bush’s 2001 high-water mark of 67 (as a transition year, this includes some Clinton orders) and Trump’s own 63 in 2017. There had been 47 in 2019 and 35 in 2018.<sup>553</sup>

Figure 15. Number of Executive Orders and Presidential Memoranda, 2002–2019



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

Memoranda are trickier to tally.<sup>554</sup> They may or may not be published, depending on each administration’s own determination of “general applicability and legal effect.”<sup>555</sup> George W. Bush published 131 memoranda during his entire presidency, whereas Barack Obama issued 257 that were published in the *Federal Register* (Figure 15). Bill Clinton published 78 during his presidency.<sup>556</sup> Donald Trump issued 38 memoranda in 2017, the highest level in at least 20 years and more than double 2019’s number. Among the 69 executive orders and 59 memoranda of 2020 under Trump are some intended to reduce burdens (see Box 1), but some such proposals are regulatory. In 2021, before Biden’s inauguration, Trump issued another 16 executive orders and five additional memoranda.

The pertinent question regarding regulatory burdens is what these executive orders and memoranda are used for and what they do. Whether lengthy or brief, orders and memoranda can have significant effects, and a smaller number of them do not necessarily means small effects. On the one hand, in 2014 alone, Obama administration memoranda (not among the presidential ones shown here) created a new financial investment instrument and implemented new positive rights regarding work hours and employment preferences for federal contractors.<sup>557</sup> On the other hand, four of Obama’s executive orders addressed overregulation and rollbacks.<sup>558</sup> Obama’s Executive Order 13563 concerning regulatory review and reform, for example, sought to roll back regulation.<sup>559</sup> It amounted to a few billion dollars

in cuts, which were swamped by other, newly issued rules and guidance. As with the *Federal Register*, counts are interesting but do not tell the full story.

Other key executive orders directed at regulatory restraint were President Bill Clinton’s 1993 Executive Order 12866<sup>560</sup> and President Ronald Reagan’s Executive Order 12291, which formalized central regulatory review at OMB.<sup>561</sup> Clinton’s was a step back from the stronger oversight of the Reagan order in that it sought “to reaffirm the primacy of Federal agencies in the regulatory decision-making process.”<sup>562</sup> In Trump’s case, a handful of his executive orders and memoranda itemized at the beginning of this report constitute perhaps the most aggressive attempt by the executive branch to streamline regulation.

The United States existed for many decades before a president issued more than two dozen executive orders—that was President Franklin Pierce, who served from 1853 to 1857. Orders numbered in the single digits or teens until President Abraham Lincoln and the subsequent Reconstruction period. President Ulysses S. Grant issued 217, then a record. From the 20th century onward, executive orders have numbered over 100 during each presidency and sometimes reached into the thousands. President Franklin D. Roosevelt—the longest-serving president in U.S. history, elected to four terms and having served a full three—issued 3,721 executive orders.<sup>563</sup> Table 5 provides a look at executive order counts by administration since the nation’s founding through the Obama presidency.<sup>564</sup>

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*The United States  
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Table 5. Executive Orders by Administration

	Sequence Number		Total Number of Executive Orders
	Ending	Beginning	
George Washington	n/a	n/a	8
John Adams	n/a	n/a	1
Thomas Jefferson	n/a	n/a	4
James Madison	n/a	n/a	1
James Monroe	n/a	n/a	1
John Quincy Adams	n/a	n/a	3
Andrew Jackson	n/a	n/a	12

	Sequence Number		Total Number of Executive Orders
	Ending	Beginning	
Martin van Buren	n/a	n/a	10
William Henry Harrison	n/a	n/a	0
John Tyler	n/a	n/a	17
James K. Polk	n/a	n/a	18
Zachary Taylor	n/a	n/a	5
Millard Fillmore	n/a	n/a	12
Franklin Pierce	n/a	n/a	35
James Buchanan	n/a	n/a	16
Abraham Lincoln	n/a	n/a	48
Andrew Johnson	n/a	n/a	79
Ulysses S. Grant	n/a	n/a	217
Rutherford B. Hayes	n/a	n/a	92
James Garfield	n/a	n/a	6
Chester Arthur	n/a	n/a	96
Grover Cleveland - I	n/a	n/a	113
Benjamin Harrison	n/a	n/a	143
Grover Cleveland - II	n/a	n/a	140
William McKinley	n/a	n/a	185
Theodore Roosevelt	n/a	n/a	1,081
William Howard Taft	n/a	n/a	724
Woodrow Wilson	n/a	n/a	1,803
Warren G. Harding	n/a	n/a	522
Calvin Coolidge	n/a	n/a	1,203
Herbert Hoover	6,070	5,075	996
Franklin D. Roosevelt	9,537	6,071	3,467
Harry S. Truman	10,431	9,538	894
Dwight D. Eisenhower	10,913	10,432	482
John F. Kennedy	11,127	10,914	214
Lyndon B. Johnson	11,451	11,128	324
Richard Nixon	11,797	11,452	346
Gerald R. Ford	11,966	11,798	169
Jimmy Carter	12,286	11,967	320
Ronald Reagan	12,667	12,287	381
George H.W. Bush	12,833	12,668	166
William J. Clinton	13,197	12,834	364
George W. Bush	13,488	13,198	291
Barack Obama	13,764	13,489	276
Donald Trump	13,984	13,765	219
<b>Total Number of Executive Orders</b>			<b>15,504</b>

Source: Author's tabulations; Executive Orders Disposition Tables Index, Office of the Federal Register, National Archives, <http://www.archives.gov/federal-register/executive-orders/disposition.html>; "Executive Orders," The American Presidency Project, ed. John T. Woolley and Gerhard Peters (Santa Barbara, CA: 1999–2014), <http://www.presidency.ucsb.edu/data/orders.php>. Executive orders for President Trump are as of March 26, 2020.

# 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.<sup>565</sup> 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.<sup>566</sup> 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.<sup>567</sup>

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.<sup>568</sup>

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.<sup>569</sup> 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.<sup>570</sup> The new portals are just a beginning toward providing clarity.

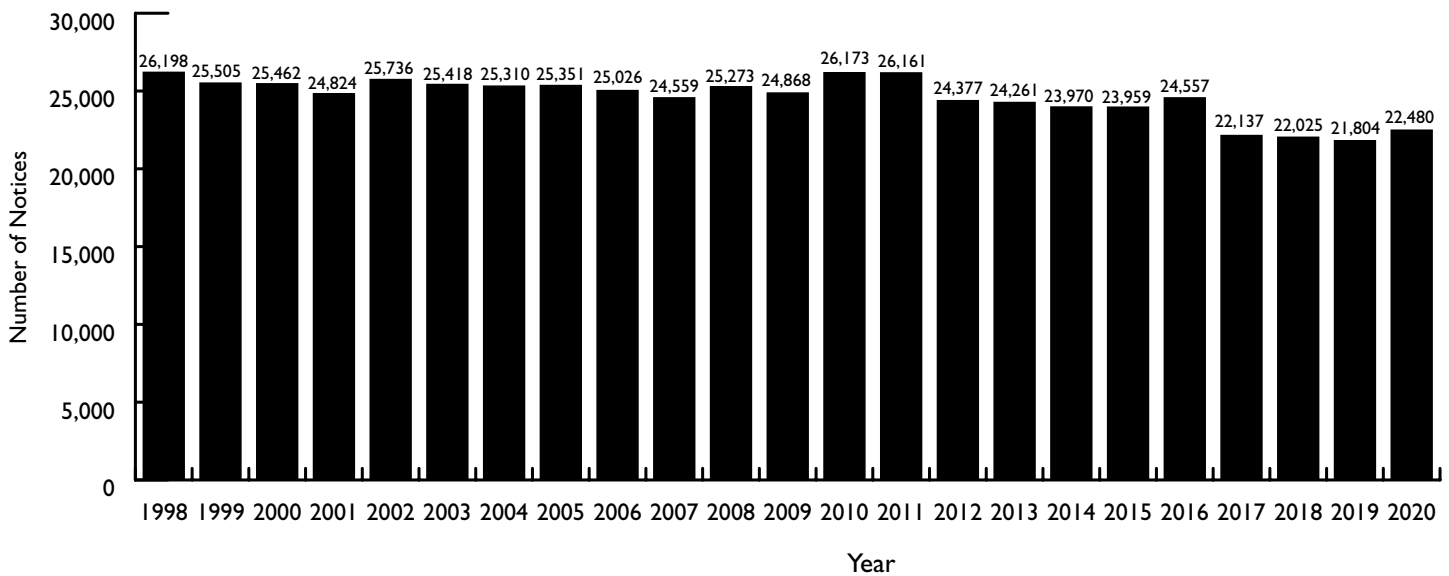
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*Without passing  
a law, government  
can influence  
various industries  
through various  
kinds of guidance  
documents.*

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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.

*Alternative regulatory actions have become a powerful means of working around the constitutional system of government envisioned by the Framers.*

### Rule Reviews at OMB's Office of Information and Regulatory Affairs

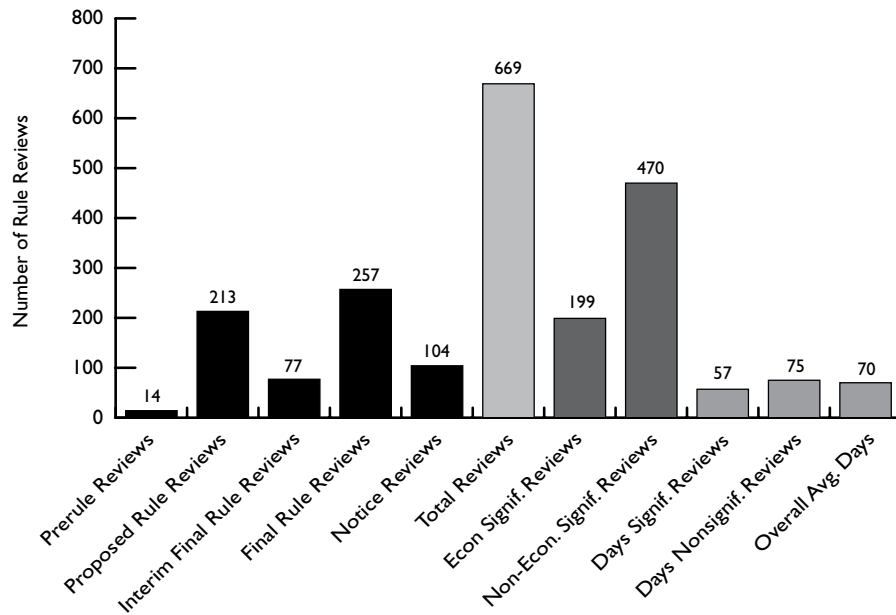
Tracking the effects of rules and regulations, executive orders, memoranda, and regulatory guidance is vital. These alternative regulatory actions have become a powerful means of working around the constitutional system of government envisioned by the Framers: legislation enacted by elected representatives.

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.<sup>571</sup> 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.<sup>572</sup> That

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

# Analysis of “The Regulatory Plan and Unified Agenda of Federal Regulations”

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*One of the goals of regulatory reform should be to improve disclosure and enhance its relevance to rulemaking.*

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One of the goals of regulatory reform should be to improve disclosure and enhance its relevance to rulemaking. “The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions” (the Agenda) is the document in which agencies outline their priorities. Like the *Federal Register*, the Agenda is one of the few limited and imperfect tools we have. Yet much could still be done to improve the quality of the information compiled within it and the frequency of its publication.

The Agenda normally appears in the *Federal Register* each fall and, minus the regulatory plan component, in the spring. However, the publication of the Unified Agenda has become erratic in recent years, suffering delays in its traditional April and October schedule, much as the annual report to Congress on regulatory costs and benefits remains even more chronically late.<sup>573</sup> Elections and other considerations by administrations, such as reporting priorities, can prompt agencies to either accelerate or slow down rulemaking or to report fewer rules, thus affecting the Agenda’s content and bulk.<sup>574</sup>

The Trump administration released the fall 2020 edition of the twice-yearly Agenda in November 2020. Usually, the Agenda appears with little fanfare and the 2020 edition was no exception. However, 2017 and 2018 saw the beginning of the one-in, two-out directive for federal agency rulemaking, by way of Trump’s Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs.” The normally unremarkable Agenda release was accompanied then by White House statements touting progress on meeting goals for regulatory streamlining and me-

dia events complete with red-tape props<sup>575</sup> and, in 2017, with a *Wall Street Journal* column by Neomi Rao, then the administrator of the Office of Management and Budget’s Office of Information and Regulatory Affairs.<sup>576</sup>

Along with those affecting the private sector, many rules in the Unified Agenda affect operations of state and local governments, either directly or indirectly. It breaks down rules into (a) rules recently completed, (b) rules anticipated or prioritized in the upcoming 12 months, and (c) longer-term rules by over 60 federal departments, agencies, and commissions. As a compilation of agency-reported federal regulatory actions at several stages, one might regard the Agenda as a cross-sectional snapshot of the following actions moving through the regulatory pipeline:

- Active actions: prerule actions, proposed and final rules
- Completed actions: actions completed during the previous six months
- Long-term actions: anticipated longer-term rulemakings beyond 12 months

The rules contained in the Unified Agenda often carry over at the same stage from one year to the next, or they may reappear in subsequent editions at different stages. In the fall 2020 edition, 444 of the active actions appeared for the first time.

Observers have long recognized the inconsistent and subjective nature of the Agenda’s contents. For example, upon release of the fall 2013 Agenda, regulatory expert Leland E. Beck remarked that the Agenda “provides

only a semi-filtered view of each agency's intentions and must be considered within its limitations." Furthermore, it "reflect[s] what the agency wants to make public, not necessarily all that they are actually considering, and some highly controversial issues may be withheld."<sup>577</sup> Rules and content fluctuate given administration priorities. For example, in 2012, during the Obama administration, spring and fall guidelines from OMB's then-director of the Office of Information and Regulatory Affairs, Cass Sunstein, altered reporting directives to agencies:

In recent years, a large number of Unified Agenda entries have been for regulatory actions for which no real activity is expected within the coming year. Many of these entries are listed as "Long-Term." Please consider terminating the listing of such entries until some action is likely to occur.<sup>578</sup>

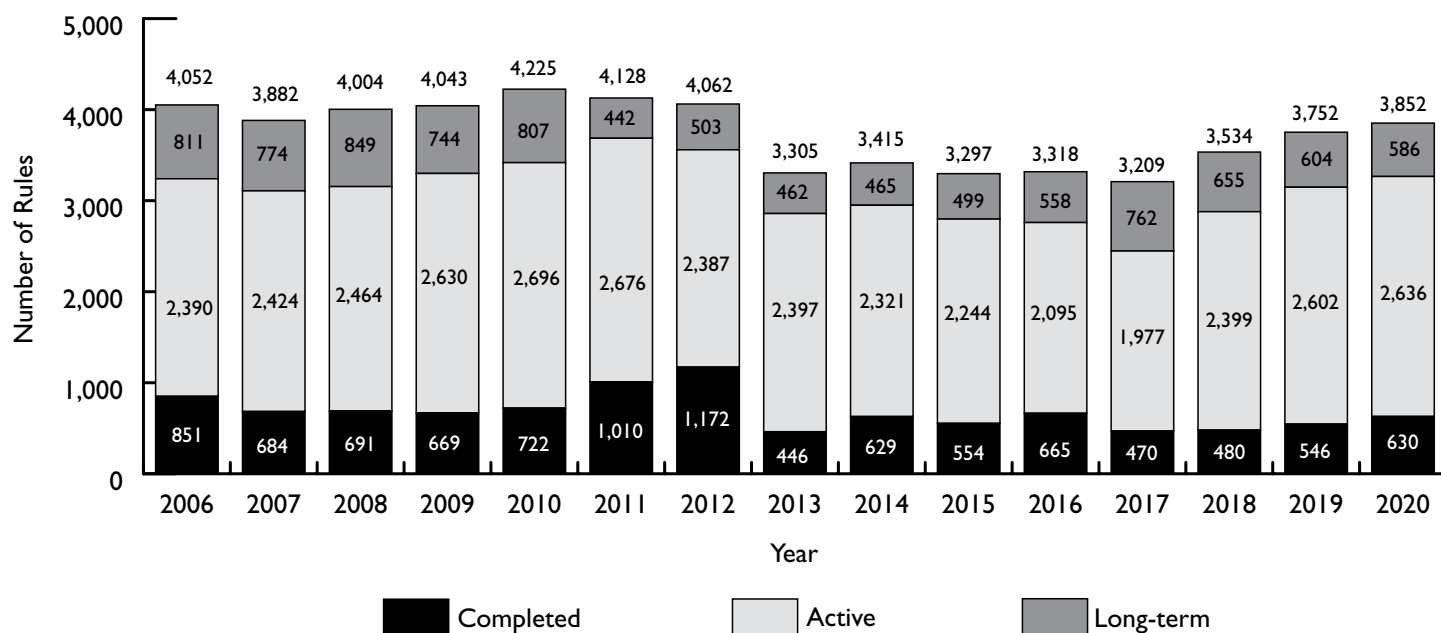
When the subsequent OIRA administrator Howard Shelanski issued a similar memo-

randum on August 7, 2013, "please consider terminating" became the more direct "please remove."<sup>579</sup> The drop in the number of rules appearing in the Agenda at that time is apparent in Figure 18.

Policy reversed again during the Trump administration. In 2017, both then acting OIRA director Dominic Mancini and then-OIRA Administrator Rao instructed agency heads:

In recent years, a large number of Unified Agenda entries have reflected regulatory actions for which no substantial activity was expected within the coming year. Many of these entries are listed as "Long-Term." We have retained the ability to list these items in the Agenda, and see merit in their continued inclusion, particularly in some instances of notable rulemakings for which no action is planned in the coming year. Please, however, consider whether the listing of such entries still benefits readers.<sup>580</sup>

Figure 18. Total Agency Rules in the Fall Unified Agenda Pipeline, 2006–2020



Source: Compiled by the author from "The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions," *Federal Register*, fall edition, consecutive years, and database at <http://reginfo.gov>.

"Active" rules consist of rules at the prerule, proposed, and final stages.

In many respects, rule reporting can be short-circuited and costs obscured. The Agenda is no different. Agencies are not required to limit their regulatory activity to what they publish in the Unified Agenda. However, that temporarily changed under the Trump administration. As Rao noted:

Agencies must make every effort to include actions they plan to pursue, because if an item is not on the Agenda, under Executive Order 13771, an agency cannot move forward unless it obtains a waiver or the action is required by law. A clear and accurate Agenda helps avoid unfair surprise and achieves greater predictability of upcoming actions.<sup>581</sup>

Healthy skepticism is justified regarding the counts in the Unified Agenda, given the lack of uniformity with respect to its content and strategic rule timing by administrations. While the political and policy climate can affect what appears in it, the Agenda nonetheless gives regulated entities and researchers a sense of the flow in the regulatory pipeline.

### 3,852 Rules in the Fall 2020 Unified Agenda Pipeline; 653 Deemed Deregulatory, 338 Regulatory

The fall 2020 “Regulatory Plan and Unified Agenda of Regulatory and Deregulatory Actions” found 68 federal agencies, departments, and commissions listing 3,852 regulations (100 more than the fall 2019) in the active (prerule, proposed, and final), just-completed, and long-term stages, many of which had been in the pipeline for some time (see Figure 18).<sup>582</sup> This count is easily Trump’s highest. There had been 3,209 in 2017, when 1,579 Obama-era planned regulatory actions and rules had been withdrawn or delayed early in the Trump administration.

Trump’s overall count of rules in the Unified Agenda pipeline was the highest since 2012,

under Obama. However, 653 rules in the pipeline were deemed “deregulatory” for purposes of Executive Order 13771, for a “net” of 3,199. (There had been 689 such rules in 2019.)

Figure 18 illustrates how, apart from 2007, the overall Unified Agenda pipeline exceeded 4,000 rules (active, completed, and long-term) each fall through 2012. Counts had been even higher in the 1990s, when an all-time-high count of 5,119 rules occurred in the fall 1994 Agenda. The sharp 19 percent drop under Obama from 4,062 rules in 2012 to 3,305 in 2013 seems to reflect, at least in part, the election year and management directive factors noted earlier. (For a history of the numbers of rules in the Unified Agenda since 1983, see Appendix: Historical Tables, Part E.)

Rule counts remain in the thousands, but many of those have come to be regarded as routine measures, such as safety directives from agencies like the Federal Aviation Administration and Coast Guard, rather than new initiatives. Such assumptions deserve rethinking. The total pipeline count of 3,852 rules depicted in Figure 18 is broken out in detail in Table 6 by issuing agency, commission, or department. It shows numbers of rules at the active, completed, and long-term stages.

Perhaps most important for assessing Trump’s one-in, two-out regulatory campaign is the question of which agencies are responsible for the 653 of 3,852 rules that are deemed “deregulatory,” which are also depicted in Table 6. For the total numbers of rules by department and agency from previous year-end editions of the Unified Agenda since 2001, see Appendix: Historical Tables, Part F.

**Active rules.** Since 2005, active rule counts in the Agenda consistently remained well above 2,000, until they fell to 1,977 under Trump in 2017, with 448 deemed deregulatory at the time. The number of active rules rose to 2,399 in 2018 (with 514 deemed deregulatory), to 2,602 in 2019 (522 deregulatory), and to 2,636 in 2020 (496

Table 6. Unified Agenda Entries by Department and Agency (Fall 2020)

	Total Rules	Unified Agenda			Deregulatory Actions		
		Active	Completed	Long Term	Active	Completed	Long Term
Dept. of Agriculture	164	114	29	21	22	6	8
Dept. of Commerce	312	196	80	36	48	16	10
Dept. of Defense	234	176	57	1	9	1	
Dept. of Education	23	15	8		5	1	
Dept. of Energy	153	132	9	12	16	4	2
Dept. of Health and Human Services	250	194	39	17	54	7	3
Dept. of Homeland Security	155	88	16	51	17	2	2
Dept. of Housing and Urban Development	52	44	6	2	9	4	
Dept. of the Interior	306	246	44	16	53	9	3
Dept. of Justice	108	78	9	21	13		
Dept. of Labor	92	63	19	10	18	9	1
Dept. of State	71	59	9	3	2		
Dept. of Transportation	301	221	29	51	147	14	12
Dept. of the Treasury	394	267	57	70	38	3	5
Dept. of Veterans Affairs	81	61	11	9	1	1	2
Agency for International Development	17	15	2		2		
Architectural and Transportation Barriers Compliance Board	2		1	1			
CPBSD*	4	4					
Commodity Futures Trading Commission	42	25	14	3			
Consumer Financial Protection Bureau	21	13	1	7			
Consumer Product Safety Commission	21	10	3	8			
Corporation for National and Community Service	9	7	1	1			
Council of Inspector General on Integrity and Efficiency	1			1			
Council on Environmental Quality	3	2	1			1	
Court Services/Offender Supervision, D.C.	7	7					
Environmental Protection Agency	232	132	45	55	24	15	7
Equal Employment Opportunity Commission	15	13	2				
Farm Credit Administration	19	15	2	2			
Federal Acquisition Regulation	61	51	10		5	3	
Federal Communications Commission	79		2	77			
Federal Deposit Insurance Corporation	56	27	20	9			
Federal Energy Regulatory Commission	12	2	1	9			
Federal Housing Finance Agency	14	10	3	1			
Federal Maritime Commission	3		3				
Federal Mediation and Conciliation Service	4		1	3			
Federal Mine Safety and Health Review Commission	2	2					

	Total Rules	Unified Agenda			Deregulatory Actions		
		Active	Completed	Long Term	Active	Completed	Long Term
Federal Permitting Improvement Steering Council	3	3					
Federal Reserve System	46	20	18	8			
Federal Trade Commission	20	18	2				
General Services Administration	32	30	2				
Institute of Museum and Library Services	2	2	0				
National Aeronautics and Space Administration	10	7	3				
National Archives and Records Administration	9	6	2	1			
National Credit Union Administration	32	29	3				
National Endowment for the Arts	6	5		1			
National Endowment for the Humanities	5	4	1				
National Indian Gaming Commission	10	9		1			
National Labor Relations Board	4	4					
National Mediation Board	1			1			
National Science Foundation	1	1					
National Transportation Safety Board	6			6			
Nuclear Regulatory Commission	56	32	7	17			
Office of Government Ethics	13	9	4				
Office of Management and Budget	9	8	1		4		
Office of National Drug Control Policy	2	2					
Office of Personnel Management	51	34	15	2	3	1	
Office of the U.S. Trade Representative	2	1	1				
Peace Corps	6	6					
Pension Benefit Guaranty Corporation	12	9	3				
Postal Regulatory Commission	5			5			
Presidio Trust	3	3					
Railroad Retirement Board	7		1	6			
Securities and Exchange Commission	80	32	15	33			
Small Business Administration	65	51	9	5	6	4	1
Social Security Administration	19	15	4				
Surface Transportation Board	10	4	3	3			
U.S. Agency for Global Media	4	2	2				
U.S. Commission on Civil Rights	1	1					
<b>TOTAL</b>	<b>3,852</b>	<b>2,636</b>	<b>630</b>	<b>586</b>	<b>496</b>	<b>101</b>	<b>56</b>

Source: Compiled from "The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions," *Federal Register*, and from the online edition at <http://www.reginfo.gov>. With Executive Order 13771 Deregulatory Component

\* Committee for Purchase from People Who Are Blind or Severely Disabled.

deregulatory) (see Figure 18). While gross active counts are back to the historical levels seen in Figure 18, they are offset by the several hundred deregulatory rules each year under Trump. However, the proportion of active rulemaking that is explicitly deregulatory appears to be on the decline.

**Completed rules.** Completed rules are “actions or reviews the agency has completed or withdrawn since publishing its last Agenda.” Note that although the number of rules in the completed category in fall Agendas (spring Agendas are not shown in Figure 18) rose steadily and rapidly under Obama—from 669 in 2009 to 1,172 in 2012, a 75.2 percent increase—they dropped precipitously in 2013 to 462. This category stood at 470 and 480 in Trump’s fall 2017 and 2018 Agendas, respectively, and rose to 546 in 2019 and to 630 in 2020. While the gross count for completed rules has returned to heights normal for the past decade, the net is lower since a significant proportion of Trump’s completed rules have been deregulatory (62 in 2017, 94 in 2018, 106 in 2019, and 101 in 2020).

**Long-term rules.** In the 2017 Agenda, Trump’s first, announced long-term rules in the pipeline stood at 762, a jump from 558 in 2016. That may have reflected in part the directives by Mancini and Rao to consider including these rules again. Thirty of the 762 were deregulatory. In 2018, long-term rules dropped to 655, with 63 of them deemed deregulatory. In 2019, they dropped again, to 604, with 61 deemed deregulatory. Long-term rules included in the fall 2020 Agenda fell to 586, with 56 deemed deregulatory. After covering economically significant rules in the Agenda, we will revisit the important deregulatory component of the fall Agenda, longer-term rules in particular, and the implications for future regulatory reductions.

## Top Rulemaking Departments and Agencies

A relative handful of executive branch agencies account for a large number of the rules

in the pipeline each year. Without distinguishing between regulatory and deregulatory, the top five rulemaking cabinet departments are Commerce, Health and Human Services, the Interior, Transportation, and the Treasury (see Table 7). These top five, with 1,563 rules among them, account for 41 percent of the 3,852 rules in the Unified Agenda pipeline.

The top five independent agencies in the Unified Agenda pipeline by rule count are the Federal Deposit Insurance Corporation, Federal Communications Commission, Securities and Exchange Commission, Small Business Administration, and the multi-agency Federal Acquisition Regulation system (see Table 7).<sup>583</sup> Their total 341 rules account for 9 percent of the 3,852 rules in the Agenda. Combined, the top executive and independent agency components make up 49 percent of the total. However, the difference between this year and prior years is that some entries are now explicitly deemed deregulatory. Therefore, it is worth noting the percentage of actions at these bodies that are deregulatory for Executive Order 13771 purposes. They are listed in Table 6.

## 261 “Economically Significant” Rules in the Unified Agenda—36 Deemed Deregulatory, 76 Regulatory

A subset of the Unified Agenda’s 3,852 rules is classified as economically significant, which means that agencies estimate their yearly economic effects at \$100 million or more. That generally reflects increased costs, although sometimes an economically significant rule is intended to reduce costs, particularly so in the wake of Executive Order 13771. As Table 8 shows, 261 economically significant rules from 21 departments and agencies appear at the active (prerule, proposed rule, and final rule), completed, and long-term stages of the pipeline. This count is up considerably from 192 in 2019 and from Trump’s earlier years (as seen in Figure



**Table 7. Top Rule-Producing Executive and Independent Agencies**  
(From Fall 2020 Unified Agenda, total of active, completed, and long-term rules)

<b>Executive Agency</b>	<b>Number of Rules</b>
1. Department of the Treasury	394
2. Department of Commerce	312
3. Department of the Interior	306
4. Department of Transportation	301
5. Department of Health and Human Services	250
<b>TOTAL</b>	<b>1563</b>
<b>% of Total Agenda Pipeline of 3,852</b>	<b>41</b>

<b>Independent Agency</b>	<b>Number of Rules</b>
1. Securities and Exchange Commission	80
2. Federal Communications Commission	79
3. Small Business Administration	65
4. Federal Acquisition Regulation	61
5. Federal Deposit Insurance Corporation	56
<b>TOTAL</b>	<b>341</b>
<b>% of Total Agenda Pipeline of 3,752</b>	<b>9</b>

<b>Top 7 Executives plus Independents</b>	<b>1,904</b>
<b>% of Total Agenda Pipeline</b>	<b>49</b>

Source: Compiled by the author from “The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions,” *Federal Register*, Fall edition, and database, <http://www.reginfo.gov>.

“Active” rules consist of rules at the prerule, proposed, and final stages.

19).<sup>584</sup> Each of those years contains deregulatory rules.

Figure 19 depicts 2020’s 261 economically significant rules alongside those of the previous decade and a half. That number represents a 36 percent increase over 2019’s 192 rules (of which 33 were classified deregulatory and 67 regulatory). The number of economically significant rules in the annual fall pipeline rose under President Obama, topped out twice at 224, and finished out 2016 with 193.<sup>585</sup> Of Trump’s 261 economically significant rules in the 2020 Agenda, 36 are deregulatory, for a “net” count of 225. Back in Trump’s first fall Unified Agenda in 2017, the administration brought the count down by 27 percent, an effect magnified by the fact that 30 of the 140 rules at that time were deemed deregulatory. (The full list of the 261 economi-

cally significant rules in the 2020 Agenda pipeline is available in Appendix: Historical Tables, Part G, which flags the 36 deregulatory and 76 regulatory entries.)

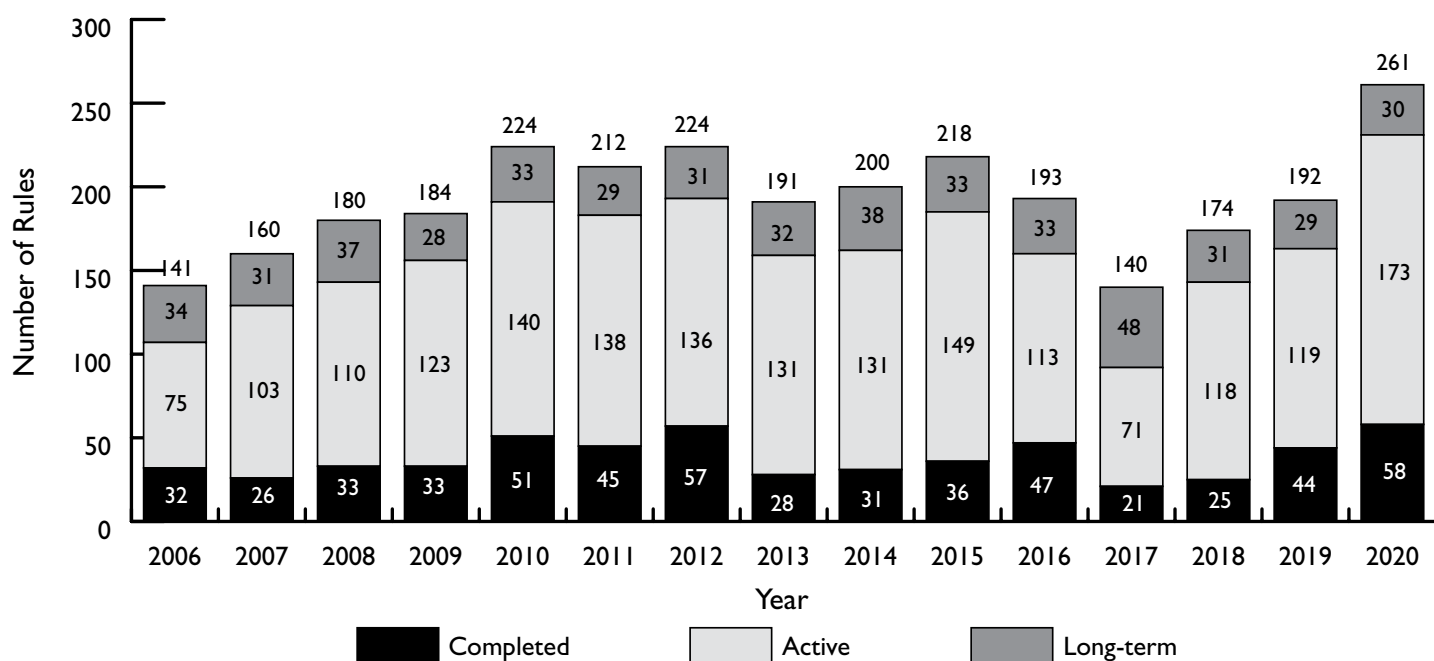
Figure 19 also breaks down economically significant rules into completed, active, and long-term categories. Of the 261 economically significant rules in the fall 2020 edition, 173 stand at the active phase, compared with 119 in 2019 and 71 in the fall 2017 edition. The new level of active rules exceeds anything seen in the Obama Agendas, even taking into account that 20 in the active category were deemed deregulatory in 2020. Barack Obama’s eight-year average of active rules across the fall Agendas was 133; George W. Bush’s eight-year average was 87. Trump’s average across the active category for his four years in office is 120, but that includes deregulatory measures.

**Table 8. 261 Economically Significant Rules in the Fall Unified Agenda Pipeline Expected to Have \$100 Million Annual Economic Impact, 36 Deemed Deregulatory, Fall 2019**

	Rules	Unified Agenda			Deregulatory Actions*		
		Active	Completed	Long Term	Active	Completed	Long Term
Dept. of Agriculture	16	13	3		2		
Dept. of Commerce	2	1	1				
Dept. of Defense	2	2					
Dept. of Education	4	3	1		3	1	
Dept. of Energy	6	5		1			
Dept. of Health and Human Services	67	42	20	5	3	2	1
Dept. of Homeland Security	22	13	4	5		1	1
Dept. of Housing and Urban Development	2	2					
Dept. of the Interior	5	3	2		1	1	
Dept. of Justice	3	2	1		2		
Dept. of Labor	14	8	2	4	3	1	
Dept. of State	1	1					
Dept. of Transportation	15	10	2	3	5	1	
Dept. of the Treasury	39	21	15	3	1	2	
Dept. of Veterans Affairs	11	8	1	2			
Consumer Product Safety Commission	1	1					
Council on Environmental Quality	1		1			1	
Environmental Protection Agency	11	7	3	1		3	
Federal Acquisition Regulation	2	1	1			1	
Federal Communications Commission	5			5			
Federal Housing Finance Agency	1	1					
Federal Permitting Improvement Steering Committee	1	1					
Nuclear Regulatory Commission	3	1	1	1			
Office of Personnel Management	1	1					
Small Business Administration	25	25					
Social Security Administration	1	1					
<b>TOTAL</b>	<b>261</b>	<b>173</b>	<b>58</b>	<b>30</b>	<b>20</b>	<b>14</b>	<b>2</b>

Source: Compiled from “The Regulatory Plan and the Unified Agenda of Federal Regulatory and Deregulatory Actions,” *Federal Register*, and from the online edition at <http://www.reginfo.gov>.

Figure 19. 261 Economically Significant Rules in the Unified Agenda Pipeline, 2006–2020



Source: Compiled from “The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions,” *Federal Register*, fall edition, various years.

**Rules that have a substantial impact in society are not always deemed economically significant.**

Rules that have a substantial impact in society are not always deemed economically significant. For example, one of the major policy events in 2020 was the creation of the Paycheck Protection Program as part of COVID relief legislation, along with the rules for implementing it. A look at the 261 economically significant rules in the fall Agenda finds 28 Small Business Administration rules at the final (not completed) stage related to the Paycheck Protection Program.

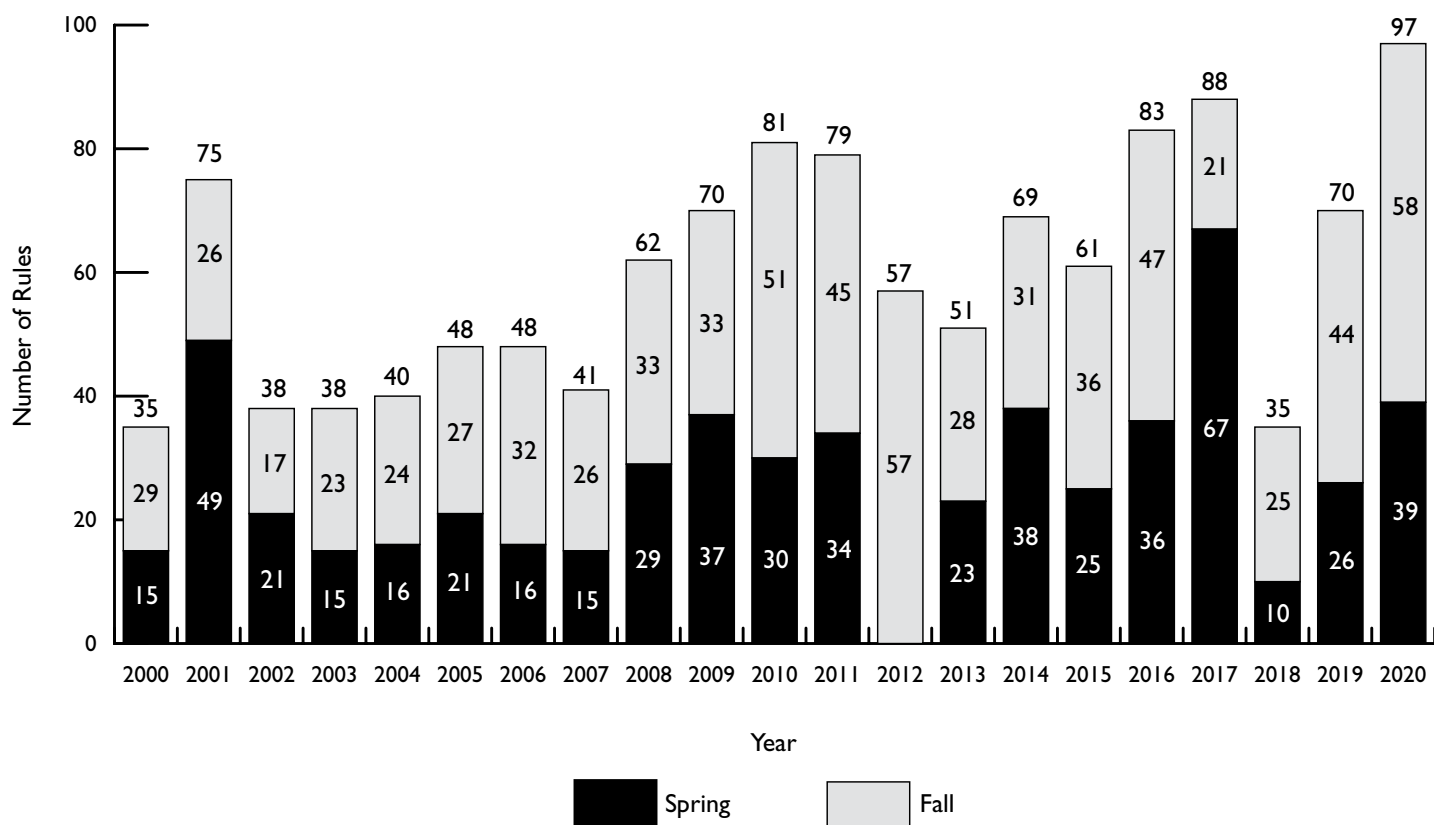
As for economically significant rules at the completed stage in the fall Agendas, President Obama’s count was consistently higher than President George W. Bush’s, even when accounting for an Obama election-year drop between 2011 and 2012. Completed rules in the fall Agenda peaked at 57 in 2012, just below the 58 in Trump’s fall Agenda. Completed economically significant rules attained their lowest point of 21 under Trump in 2017. Of the 58 Trump rules completed in the fall 2020 Agenda, 14 are deemed deregulatory. This leaves a net of 44 that, with a few exceptions, exceeds “historical” levels (see Figure 19).

For a fuller picture of completed rules in any given year, one must incorporate the completed rules from the spring Agendas. Figure 20 isolates the totals of completed economically significant rules since 1996 from both the spring and fall Agendas for a closer analysis of yearly trends in this category.<sup>586</sup>

As Figure 20 shows, completed economically significant rules totaled 35 in the combined fall and spring 2018 Agendas under Trump, rose to 70 in 2019, then peaked at 97 in 2020. In both 2017 and 2020, Trump issued more completed economically significant rules than either Bush or Obama in any given year. That may be partly due to the Administrative Procedure Act’s requirement for the issuing of a new rule to get rid of an old one. That means that when agencies eliminate two for one, it may appear as if more “rules” are being issued.

In 2018, 16 of the 35 completed rules were deemed deregulatory for Executive Order 13771 purposes. In 2019, 18 of 70 are designated deregulatory; and in 2020, 21 of 97 are. If one were to remove the deregulatory

Figure 20. Annual Completed Economically Significant Rules in the Unified Agenda, 2000–2020



Sources: Compiled from “The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions,” *Federal Register*, spring and fall editions, various years.

rules from Trump’s tallies, a substantial numerical rollback in economically significant rulemaking is evident compared with his predecessors’ output.

Of course, other presidents have issued deregulatory measures, but they did not make the reduction agenda so explicit or ease the tracking of the relevant metrics as the Trump administration did with the Executive Order 13771 “deregulatory” designations in the OIRA database. The reaction to the COVID-19 crisis is another variable affecting rule flow. Agencies were instructed to use emergency powers, some of which affected federal programs, though not always with deregulatory effect.

Apart from 2001, the level of completed economically significant rules from 1996 forward was notably lower during the late 1990s and early 2000s. Bush’s total num-

ber of completed economically significant rules was 390, for an average of 49 per year. Obama’s total for his eight years was 551, an average of 69 per year. Some agency “midnight regulations” from the prior administration may be reflected in the totals for a first-year president, but this report is primarily concerned with calendar-year comparisons. Trump’s average is 72 (from a total of 289), but again, some of these rules are deregulatory.

As noted, of the 3,852 rules in the Agenda, each of the 261 deemed economically significant is estimated to have annual impacts of at least \$100 million. In any other year, those rules might be expected to eventually impose annual costs of at least \$26.1 billion (loosely, 261 rules multiplied by the \$100 million economically significant threshold). However, some rules under Trump decrease costs, which offset that total, and for which

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*Many of the things that regulations purport to do are worthy and needed pursuits. However, that does not mean the federal administrative bureaucracy offers the best means of achieving them.*

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the administration reported separately.<sup>587</sup> Whatever the actual total cost, regulatory costs are cumulative and recurring costs need to be added to the previous years' costs. And, as noted, agencies are not limited in their activities to what they list in the Agenda.

Attention to economically significant rules should not distract policy makers and analysts from the remaining bulk of rules in the annual pipeline, which can have significant costs of their own. In the fall 2020 pipeline, 3,591 federal rules were not designated as economically significant (3,852 total rules minus the 261 economically significant ones). However, a rule estimated to cost below the \$100 million economically significant threshold can still impose substantial costs on the regulated entities. To this we must add the regulatory effects of budget rules and guidance documents with regulatory impact.

### Notable Regulations by Agency

Many of the things that regulations purport to do are worthy and needed pursuits. However, that does not mean the federal administrative bureaucracy offers the best means of achieving them, compared with state and local oversight, along with insurance, liability, and other voluntary-sector options. In recent Unified Agenda editions and in other venues, federal agencies have noted the regulatory initiatives listed below, among others pending or recently completed. As noted, the full list of the 261 economically significant rules in the fall 2020 Agenda pipeline appears in Appendix: Historical Tables, Part G.

### Department of Agriculture

- Rural Broadband Grant, Loan, and Loan Guarantee Program; and Rural e-Connectivity Program (ReConnect Program)
- Establishment of a domestic hemp production program

- Revision of the nutrition facts panels for meat and poultry products and updating certain reference amounts customarily consumed
- Supplemental Nutrition Assistance Program: procedural requirements for households that have zero gross countable income and include a work registrant
- Coronavirus Food Assistance Program
- Conservation Stewardship Program
- National Bioengineered Food Disclosure Standard
- Mandatory country-of-origin labeling of beef, fish, lamb, peanuts, and pork
- National school lunch and school breakfast programs: nutrition standards for all foods sold in schools and certification of compliance with meal requirements for the national school lunch program (as required by the Healthy, Hunger-Free Kids Act of 2010)<sup>588</sup>
- Standards for grades of canned baked beans<sup>589</sup>
- Rural Energy for America Program
- Mandatory inspection of catfish and catfish products
- Multifamily housing reinvention
- Inspection regulations for eggs and egg products
- Performance standards for ready-to-eat processed meat and poultry products
- Modernization of poultry slaughter inspection

### Department of Commerce

- Taking and importing marine mammals: taking marine mammals incidental to geophysical surveys related to oil and gas activities in the Gulf of Mexico
- Setting and adjusting patent fees during FY 2020
- Right-whale ship strike reduction

### Department of Education

- Gainful employment rule to prepare students for employment in a recognized occupation

- Proposed priorities, requirements, definitions, and selection criteria: Striving Readers Comprehensive Literacy Program
- Income-driven “pay as you earn” program
- Race to the Top

## *Department of Energy*

- Energy efficiency and conservation standards for the following: ceiling fans; manufactured housing; automatic commercial ice makers; wine chillers; battery chargers and power supplies; televisions; residential dehumidifiers; computer servers and computers; walk-in coolers and freezers; residential furnace fans, boilers, central air conditioners, heat pumps, dishwashers, conventional cooking products, and non-weatherized gas furnaces; mobile home furnaces and gas furnaces; electric distribution transformers; commercial refrigeration units, heat pumps, and water-heating equipment; clothes washers and dryers; room air conditioners; portable air conditioners; pool heaters and direct heating equipment; fluorescent and incandescent lamps; metal halide lamp fixtures; small electric motors; and refrigerated bottled or canned beverage vending machines
- Proposed rule on Executive Order 13920, “Securing the United States Bulk-Power System”
- Fossil fuel-generated energy consumption reduction for new federal buildings and major renovations of federal buildings
- Incentive program for manufacturing advanced technology vehicles

## *Department of Health and Human Services*

- Direct Regulatory Cleanup Initiative
- Department of Health and Human Services Promotion of the rule of law through transparency and fairness in civil administrative enforcement and adjudication

- Policy and regulatory revisions in response to the COVID-19 public health emergency
- Clinical Laboratory Improvement Amendments and Patient Protection and Affordable Care Act; additional policy and regulatory revisions in response to the COVID-19 public health emergency
- COVID-19 hoarding prevention under the Defense Production Act
- Nutrient content claims, definition of the term “healthy”
- Frozen cherry pie: proposed revocation of a standard of identity and a standard of quality<sup>590</sup>
- Tobacco product standard for characterizing flavors in cigars
- Requirements for additional traceability records for certain foods
- General and plastic surgery devices: restricted sale, distribution, and use of sunlamp products
- Prohibition of sale of tobacco products to persons younger than 21 years of age
- Medicaid programs reducing provider and patient burden, and promoting patients’ electronic access to health information
- Hospice wage index, payment rate update, and quality reporting requirements
- Revisions to payment policies under the Physician Fee Schedule and other revisions to Medicare Part B
- Modernizing and clarifying the physician self-referral regulations
- Hospital inpatient prospective payment systems for acute care hospitals, the Long-Term Care Hospital Prospective Payment System, and FY 2021 rates
- Sunscreen drug products for over-the-counter human use guidance
- Rules deeming electronic cigarettes and components subject to the Federal Food, Drug, and Cosmetic Act, as amended by the Family Smoking Prevention and Tobacco Control Act, and being subjected to warning labels and sale restrictions<sup>591</sup>
- Required warnings for cigarette packages and advertisements
- Food labeling: serving sizes of foods that can reasonably be consumed at one eating occasion; dual-column label-

ing; modification of certain reference amounts customarily consumed

- Nutrition labeling for food sold in vending machines and for restaurant menu items
- Food labeling: trans fatty acids in nutrition labeling, nutrient content claims, and health claims
- Rule on safety and effectiveness of consumer antibacterial soaps (“Topical Antimicrobial Drug Products for Over-the-Counter Human Use”);<sup>592</sup> consumer antiseptics
- Federal policy for the protection of human subjects
- Criteria for determining whether a drug is considered usually self-administered
- Substances prohibited from use in animal food or feed; registration of food and animal feed facilities
- Updated standards for labeling of pet food
- Sanitary transportation of human and animal food
- Focused mitigation strategies to protect food against intentional adulteration
- Produce safety regulation
- Mammography quality standards
- Fire safety and sprinkler requirements for long-term care facilities
- Pediatric dosing for various over-the-counter cough, cold, and allergy products
- Rule on comprehensive care for joint replacement
- Medication-assisted treatment for opioid use disorders reporting requirements
- Patient Protection and Affordable Care Act; standards related to essential health benefits, actuarial value, and accreditation; Medicaid, exchanges, and children’s health insurance programs: eligibility, appeals, and other provisions
- Revisions to promote patients’ electronic access to health care information and improve interoperability for Medicare- and Medicaid-participating providers and suppliers
- Good manufacturing practice in manufacturing, packing, or holding dietary ingredients and dietary supplements
- Good manufacturing practice regulations for finished pharmaceuticals
- Prior authorization process for certain durable medical equipment, prosthetic, orthotics, and supplies

- Bar code label requirements for human drug products and blood

## *Department of Homeland Security*

- Computer Assisted Passenger Prescreening System, providing government access to passenger reservation information
- Removing H-4 dependent spouses from the classes of aliens eligible for employment authorization
- Affidavit of support on behalf of immigrants
- Collection and use of biometrics by U.S. Citizenship and Immigration Services; and collection of biometric data from aliens upon entry to and exit from the United States
- Western Hemisphere Travel Initiative: noncompliant traveler fee
- Air cargo advance screening
- Visa Security Program fee
- Establishing a fixed time period of admission and an extension of stay procedure for nonimmigrant academic students, exchange visitors, and representatives of foreign information media
- Cost of assistance estimates in the disaster declaration process for the Public Assistance Program
- Emergency Management Priorities and Allocations System
- COVID-19 hoarding prevention under the Defense Production Act
- Passenger screening using advanced body-imaging technology
- Importer security filing and additional carrier requirements
- Air cargo screening and inspection of towing vessels
- Minimum standards for driver’s licenses and ID cards acceptable to federal agencies

## *Department of Housing and Urban Development*

- Revision of manufactured home construction and safety standards regarding location of smoke alarms
- Instituting smoke-free public housing<sup>593</sup>

- Regulation of Fannie Mae and Freddie Mac on housing goals
- Regulations within the Real Estate Settlement Procedures Act pertaining to mortgages and closing costs
- Establishing a more effective fair-market rent system; using small-area fair-market rents in Housing Choice Voucher Program (modification of income and rent determinations in public and assisted housing)
- Overtime rule: “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees”<sup>595</sup>
- Establishing a minimum wage for contractors (Executive Order 13658)
- Establishing paid sick leave for businesses that contract with the federal government (in response to Executive Order 13706)<sup>596</sup>

### *Department of the Interior*

- Revised requirements for well plugging and platform decommissioning
- Revisions to the requirements for exploratory drilling on the Arctic Outer Continental Shelf
- Endangered and threatened wildlife and plants: removal of the gray wolf from the List of Endangered and Threatened Wildlife
- Increased safety measures for oil and gas operations and exploratory drilling on the Arctic Outer Continental Shelf<sup>594</sup>
- Blowout prevention for offshore oil and gas operations
- Walking working surfaces and personal fall protection systems (slips, trips, and fall prevention)<sup>597</sup>
- Hearing conservation program for construction workers
- Rules regarding confined spaces in construction: preventing suffocation and explosions
- Reinforced concrete in construction
- Preventing back-over injuries and fatalities
- Cranes and derricks
- Protective equipment in electric power transmission and distribution
- Refuge alternatives for underground coal mines
- Combustible dust
- Injury and illness prevention program
- Application of the Fair Labor Standards Act to domestic service

### *Department of Justice*

- Nondiscrimination on the basis of disability: accessibility of Web information and services of state and local governments
- National standards to prevent, detect, and respond to prison rape
- Retail sales of scheduled listed chemical products
- Occupational exposure to styrene crystalline silica, tuberculosis, and beryllium<sup>598</sup>
- Implementation of the health care access, portability, and renewability provisions of the Health Insurance Portability and Accountability Act of 1996
- Group health plans and health insurance issuers relating to coverage of preventive services under the Patient Protection and Affordable Care Act
- Health care standards for mothers and newborns
- Process safety management and prevention of major chemical accidents

### *Department of Labor*

- Conflict-of-interest rule in financial investment advice
- Financial factors in selecting plan investments
- Tip regulations under the Fair Labor Standards Act
- Independent contractor status under the Fair Labor Standards Act

### *Department of Transportation*

- Quiet car rule; minimum sound requirements for hybrid and electric vehicles<sup>599</sup>
- Federal Aviation Administration rule on operation and certification of



drones and near critical infrastructure facilities<sup>600</sup> (waivers on discretionary basis<sup>601</sup>)

- National Highway Traffic Safety Administration, Federal Motor Vehicle Safety Standard 150: vehicle-to-vehicle communication
- Flight attendant duty period limitations and rest requirements
- Rear seat belt reminder system
- Retroreflective tape and underride guards for single-unit trucks
- Medium and heavy-duty fuel efficiency standards
- Establish side-impact performance requirements for child restraint systems
- Corporate Average Fuel Economy civil penalties
- Safer Affordable Fuel-Efficient Vehicles Rule for model years 2021–2026 passenger cars and light trucks
- High-Speed Intercity Passenger Rail Program; Buy America program requirements
- Federal Motor Carrier Safety Administration and National Highway Safety Administration (NHTSA) rule on speed limiters and electronic stability control systems for heavy vehicles<sup>602</sup>
- Federal Railroad Administration's Train Crew Staffing Rule seeking a two-engineers-on-a-train mandate<sup>603</sup>
- NHTSA rule on lighting and marking on agricultural equipment<sup>604</sup>
- Minimum training requirements for entry-level commercial motor vehicle operators and for operators and training instructors of multiple-trailer combination trucks<sup>605</sup>
- Passenger car and light truck CAFE standards (newer model years)
- Requirement for installation of seat belts on motor coaches; rear center lap and shoulder belt requirement; seat belt reminder system
- Carrier safety fitness determination
- Hours of service, rest, and sleep for truck drivers; electronic logging devices and hours-of-service supporting documents
- Standard for rearview mirrors
- Commercial driver's license drug and alcohol clearinghouse

- Automotive regulations for car lighting, door retention, brake hoses, daytime running-light glare, and side-impact protection
- Federal Railroad Administration passenger equipment safety standards amendments
- Rear-impact guards and others safety strategies for single-unit trucks
- Amendments for positive train control systems
- Aging aircraft safety
- Upgrade of head restraints in vehicles
- Registration and training for operators of propane tank-filling equipment
- Monitoring systems for improved tire safety and tire pressure
- Hazardous materials: transportation of lithium batteries

## *Department of the Treasury*

- Prohibition of funding of unlawful Internet gambling
- Small Business Administration Business Loan Program temporary changes; Paycheck Protection Program—additional criteria for seasonal employers
- Business Loan Program temporary changes; Paycheck Protection Program Requirements—loan forgiveness
- Provisions pertaining to certain transactions by foreign persons involving real estate in the United States
- Provisions pertaining to certain investments in the United States by foreign persons
- Anti-money laundering program and suspicious activity report filing requirements for investment advisers
- Prohibitions and restrictions on proprietary trading and certain interests in, and relationships with, hedge funds and private equity funds
- Margin and capital requirements for covered swap entities
- Regulatory capital rule: temporary exclusion of U.S. Treasury securities and deposits at Federal Reserve Banks from the supplementary leverage ratio
- Regulatory capital rule: Payment Protection Program lending facility and Payment Protection Program loans

- Financial Crimes Enforcement Network: cross-border electronic transmittals of funds
- Assessment of fees for large bank holding companies and other financial entities supervised by the Federal Reserve to fund the Financial Research Fund (which includes the Financial Stability Oversight Council)
- Troubled Asset Relief Program standards for compensation and corporate governance

### ***Architectural and Transportation Barriers Compliance Board***

- Americans with Disabilities Act accessibility guidelines for passenger vessels
- Information and communication technology standards and guidelines

### ***Consumer Financial Protection Bureau***

- Proposed rule regulating business practices on payday and vehicle title loans<sup>606</sup>

### ***Consumer Product Safety Commission***

- Regulatory options for table saws
- Flammability standards for upholstered furniture and bedclothes
- Testing, certification, and labeling of certain consumer products
- Banning of certain backyard playsets
- Product registration cards for products intended for children

### ***Council on Environmental Quality***

- Update to the regulations for implementing the procedural provisions of the National Environmental Policy Act

### ***Environmental Protection Agency***

- National primary drinking water regulations for lead and copper: regulatory revisions

- Control of air pollution from new motor vehicles: heavy-duty engine standards: Cleaner Trucks Initiative
- National emission standards for hazardous air pollutants for major sources: industrial, commercial, and institutional boilers and process heaters: amendments
- Review of dust-lead post-abatement clearance levels
- Reclassification of major sources as area sources under Section 112 of the Clean Air Act
- Oil and natural gas sector: emission standards for new, reconstructed, and modified sources reconsideration
- Greenhouse gas emissions and fuel efficiency standards for medium- and heavy-duty engines and vehicles
- Performance standards for new residential wood heaters
- Model trading rules for greenhouse gas emissions from electric utility generating plants constructed before January 7, 2014
- Financial responsibility requirements under Comprehensive Environmental Response, Compensation, and Liability Act Section 108(b) for classes of facilities in the hard-rock mining industry
- Clean air visibility, mercury, and ozone implementation rules
- Effluent limitations guidelines and standards for the steam electric power generating point source category
- Revision of stormwater regulations to address discharges from developed sites
- Formaldehyde emissions standards for composite wood products
- National emission standards for hazardous air pollutants from certain reciprocating internal combustion engines and auto paints
- Review of National Ambient Air Quality Standards for lead, ozone, sulfur dioxide, particulate matter, and nitrogen dioxide
- Revision of underground storage tank regulations: revisions to existing requirements and new requirements for secondary containment and operator training
- Trichloroethylene; rulemaking under Toxic Substances Control Act Section 6(a); vapor degreasing

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*The administrative state retreated little in the face Trump's stand-alone deregulatory agenda.*

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- Reassessment of use authorizations for polychlorinated biphenyls (PCBs) in small capacitors in fluorescent light ballasts in schools and day-care centers
- Rulemakings regarding lead-based paint and the Lead Renovation, Repair, and Painting Program for public and commercial buildings
- Standards for cooling water intake structures
- Standards of performance for municipal solid waste landfills
- Control of emissions from non-road spark-ignition engines, new locomotives, and new marine diesel engines

### *Federal Communications Commission*

- Protecting the privacy of customers of broadband and other telecommunications services<sup>607</sup>
- Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions
- Processing applications in the direct broadcast satellite (DBS) service; feasibility of reduced orbital spacing for provision of DBS service in the United States
- Restoring Internet freedom; protecting and promoting the open Internet
- Broadband for passengers aboard aircraft
- Broadband over power line systems
- Satellite broadcasting signal carriage requirements

### *Federal Acquisition Regulation*

- Prohibition on contracting with entities using certain telecommunications and video surveillance services or equipment

### *Federal Deposit Insurance Corporation*

- Standardized approach for risk-weighted assets
- Margin and capital requirements for covered swap entities

### *Federal Energy Regulatory Commission*

- Critical infrastructure protection reliability standards

### *Federal Permit Improvement Steering Council*

- Adding land revitalization as a sector of projects eligible for coverage under Title 41 of the Fixing America's Surface Transportation Act

### *Office of Personnel Management*

- Multistate exchanges: implementations for Affordable Care Act provisions
- Paid parental leave and miscellaneous provisions of the Family and Medical Leave Act

### *Limitations of Trump's One-In, Two-Out Campaign*

The administrative state retreated little in the face Trump's stand-alone deregulatory agenda. The regulatory reform task forces, which started with enthusiasm, faded slowly, although a flurry of deregulatory energy remained at some agencies during 2020. Moreover, regulatory reform is made more difficult by the fact that many businesses lobby against substantial regulatory changes to maintain an edge over upstart competitors.<sup>608</sup> In the fall 2020 Agenda, completed significant deregulatory actions exceeded regulatory ones, but the active and long-term rules in the pipeline are a reason for concern.

There has long been a need for greater clarity on whether agency actions listed in the Unified Agenda, *Federal Register*, and OMB's annual *Report to Congress* on benefits and costs are regulatory or deregulatory. Pertinent to that, perhaps the most important modification was the presentation in Trump's Regulatory Plan and Unified Agenda of matters

pertaining to Executive Order 13771. Rules and regulations can now be more methodically identified by readers of the Unified Agenda as regulatory or deregulatory.<sup>609</sup> Because of the change, the OIRA database now can better capture those and other specifics, such as regulatory measures and identification of rules not subject to the order.

In particular, on the landing page of OIRA's database for each edition of the Agenda, a search option appears for "Executive Order 13771 Designation." The Agenda's inclusion of deregulatory actions enables researchers and the public to identify which regulations agencies have classified as either deregulatory or regulatory. Over time, that should enable researchers to determine whether regulation is increasing or decreasing.<sup>610</sup> Categories of rules not subject to the executive order are now classified under other categories: "fully or partially exempt," "not subject to," "not significant," "other," and "independent agency." Table 9 shows the number of such rules at the completed, active, and long-term stages relative to the overall count of 3,752, broken down into economically significant, major, and other significant categories.

Incorporating similar disclosures into the *Federal Register* and other publicly released reports could give a significant boost to regulatory accountability thanks to increased scrutiny of rules.

The fall 2017 Agenda pipeline of 3,209 contained the fewest rules since 1983, even without counting that edition's 540 deregulatory entries (see Figure 18). As noted, the Trump administration that year boasted of achieving a 1-in, 22-out ratio. That is, the administration claimed that three rules were added and 67 removed for purposes of Executive Order 13771. In 2018, the ratio for significant regulations for FY 2018 fell but remained at four to one, and 12 to one when rollbacks of rules not deemed "significant" are counted. In 2019, the directive was met with a 4.3-to-1 ratio of rules removed to significant rules added. Comparing significant deregulatory with significant regulatory actions yielded a 1.7-out-to-1-in ratio reported

in OIRA's "Regulatory Reform Results for Fiscal Year 2019."<sup>611</sup>

As Table 9 shows, a total of 653 rules in the fall 2020 Unified Agenda pipeline were classified as deregulatory (compared with 689 in 2019, 671 in 2018, and 540 in 2017). The fall 2020 Agenda count of 3,852 rules, with 653 being deregulatory, yields a "net" amount of 3,199 new rules. However, there is no way to readily compare what deregulatory elements may have been embedded within prior years' Agenda counts.<sup>612</sup>

Table 9 depicts a breakdown of 2020's 653 deregulatory measures by issuing department or agency, as well as stage of completion. The Department of Commerce, the EPA, and the Department of Transportation led in completed deregulatory actions, with 16, 15, and 14, respectively. The Department of Transportation was far ahead in the "active" component with 147. Meanwhile, 338 rules are classified as explicitly regulatory—compared with 324 in 2019 and 257 in 2018—for an overall gross ratio of 1.93 to 1 in the fall 2020 pipeline as a whole (as opposed to the completed component that is the subject of Executive Order 13771).

While agencies met Trump's two-for-one goals as far as the fall Agenda is concerned—with a ratio of 3.74 to 1, or 101 deregulatory measures divided by 27 significant regulatory ones—if we compare significant to significant, the ratio is 1.8 to 1, still meeting the two-for-one goal with a bit of rounding up.

Yet a deeper look suggests that agencies appear to be planning more regulatory activity than rollbacks in future years, as a glance at Table 9's active and long-term "economically significant" and "other significant" components show. Furthermore, Executive Order 13771 applied to "significant regulatory actions" of executive, but not independent, agencies.

Also, as noted, agencies are not required to issue only the rules they describe in the Agenda or Regulatory Plan. The administration issued an important qualifier when

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*Agencies appear to be planning more regulatory activity than rollbacks in future years.*

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Table 9. Unified Agenda Entries by Executive Order 13771 Designation (Deregulatory and Regulatory) and by Rule Stage and Significance, Fall 2020

	Total # Rules	Completed				Active				Long-Term			
		Total	Economically Significant	Major	Other Significant	Total	Economically Significant	Major	Other Significant	Total	Economically Significant	Major	Other Significant
All Agencies	3,852	630	58	80	150	2,636	173	182	816	586	30	30	177
Deregulatory	653	101	14	15	35	496	20	21	159	56	2	2	16
Regulatory	338	31	12	12	15	238	51	54	141	69	13	13	49
Fully or Partially Exempt	315	66	7	8	35	218	22	25	111	31	1	2	7
Not subject to, not significant	1,044	233	2	2	4	717	5	3	46	94		0	3
Other	917	83	15	16	37	699	70	71	298	135	7	6	64
Independent Agency	585	116	8	27	24	268	5	8	61	201	7	7	38
Totals (may not sum fully)	3,852	630	58	80	150	2,636	173	182	816	586	30	30	177
Ratios—Dereg/Reg:	1.93	3.26	1.17	1.25	2.33	2.08	0.39	0.39	1.13	0.81	0.15	0.15	0.33

EO13771 ratio on completed "significant regulatory actions" - All Dereg/Significant Reg:	3.74
EO13771 apples-to-apples (not mandated) - Significant Dereg/Significant Reg:	1.81
Economically Significant Deregulatory, Overall:	36
Economically Significant Regulatory, Overall:	76
Major Deregulatory, Overall:	38
Major Regulatory, Overall:	79

Source: Compiled from fall 2017 “Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions.”

defining Executive Order 13771 regulatory actions:

EO 13771 regulatory actions are defined as those final actions that both impose costs greater than zero and qualify as “significant” under Section 3(f) of EO 12866 (see M-17-21, Q2). Accordingly, the regulatory actions listed in this table [of regulatory cost caps] represent a subset of an agency’s total regulatory actions.<sup>613</sup>

The order did not require offsetting rules not deemed significant, which can be a subjective determination by agencies. Moreover, agencies can employ subsignificant rules, as well as issue guidance documents, to fly below the radar. (However, some nonsignificant rules did get labeled as either deregulatory or regulatory as the subsets that do not tally up to 653 make plain.)

### ***Completed Deregulatory and Regulatory Actions in the Unified Agenda***

The former administration’s fiscal year updates since 2017 largely corresponded to what appears in the Agenda. The Unified Agenda’s completed components from the combined spring and fall editions closely correspond to the highlighted “22-to-1” successes claimed by the Trump administration in its 2017 “Two-for-One Status Report and Regulatory Cost Caps,”<sup>614</sup> its 12-to-1 (4 to 1 for significant actions) “Regulatory Reform Results for Fiscal Year 2018,” and the 1.7 to 1 in the corresponding 2019 report.<sup>615</sup>

It is acceptable for agencies to apply nonsignificant rules for “credit” toward the two-for-one goal.<sup>616</sup> The primary goal of the two-for-one campaign was for net regulatory costs to add to less than zero. In 2017, when the administration indicated 67 deregulatory actions in its Status Report, the 2017 Unified Agenda identified a similar 62

completed deregulatory actions. Part of the discrepancy is likely due to the fact that nine of Trump’s rule cuts involved agency subregulatory guidance documents or notices, some of which did not appear in the Agenda.<sup>617</sup> Another reason is that some removals were then achieved via the Congressional Review Act and therefore did not appear in the Agenda. By 2018, the Congressional Review Act and rollback of Obama midnight rules were no longer factors available to boost one-in, two-out results.

As Table 9 shows, of the 101 completed deregulatory actions in the 2020 Agenda, 14 fall under the economically significant category, while 35 are deemed other significant (for a total of 49 significant deregulatory rules). As for regulatory actions, 31 completed ones appeared in the fall Agenda, with 12 deemed economically significant and 15 other significant. Therefore, in the final months covered by the fall Agenda, a still-healthy 3.74-to-1 ratio prevails overall (the 101 deregulatory actions divided by the 27 significant regulatory ones in Table 9). Even looking at significant deregulatory items alone, a 1.8-to-1 ratio prevails. That said, allegedly nonsignificant regulatory actions can be added without offset. Furthermore, without a deep dive, we may not know what the “other,” “not subject to,” and “partially exempt” categories contain—and there are thousands of such rules. This is a red flag, since most rules fall into these categories. These classifications, along with agency guidance documents, need greater scrutiny.

Table 10 summarizes Unified Agenda deregulatory-to-regulatory results since the fall of 2017 for rules at the significant and economically significant levels. As noted, it is adequate under Executive Order 13771 for nonsignificant rules to offset significant ones to meet the two-for-one goal; the governing criterion is achieving the goal of net-zero costs. Still, a two-to-one ratio was achieved. Regarding the prospects of longer-term streamlining, it is worrying that economically significant deregulatory

Table 10. Trump Administration Unified Agenda Lookback: Completed Significant Deregulatory and Significant Regulatory Rules and “Significant Deregulatory-to-Significant Regulatory” Ratios

Unified Agenda Edition	Deregulatory Entries	Regulatory Entries	Ratio (In/Out)
Fall 2017	22	13	1.7 to 1
Spring 2018	28	9	3.1 to 1
Fall 2018	35	9	3.9 to 1
Spring 2019	33	15	2.2 to 1
Fall 2019	37	28	1.3 to 1
Spring 2020	38	31	1.2 to 1
Fall 2020	49	27	1.8 to 1
<b>Grand Total</b>	<b>242</b>	<b>132</b>	<b>2.2 to 1 to date</b>

Combined “economically significant” plus “other significant” categories

rules did not offset economically significant regulatory ones.

### Significant Active Deregulatory and Regulatory Actions

Active actions—those in the pipeline at the prerule, proposed, and final rule stages—can be thought of as the rules in the production process. Table 9 shows that a total of the 496 deregulatory actions in play well exceeds the 238 regulatory ones. That represents a 2.1-to-1 margin overall with rules not deemed significant (which are not required to be offset) included. As noncompleted actions, these rules were not obligated to meet the two-for-one goals, but they might be regarded as a leading indicator of future rulemaking activity.

Of more concern are the costlier subsets of these active rules. There are 51 economically significant regulatory actions in the works in Table 9 (compared with 39, 41, and 15 in the prior three years), but just 20 economically significant deregulatory actions in play to offset them. Were Trump to have remained in office, this factor put two-for-one on a path to being not just unmet, but inverted, which is now a distinct likelihood under the new administration. In the “other significant” category, 141 regulatory actions are “offset” by 159 deregulatory ones, but not by a factor of two to one. These increas-

ingly unfavorable ratios of significant active regulatory to deregulatory rules highlight the limits of unilateral executive regulatory liberalization apart from freezes or slowdowns.

### Long-Term Planned Regulatory Actions Greatly Outstrip Deregulatory Ones

The costlier longer-term significant rules inspire even less confidence in the prospects for executive branch streamlining. Here, agencies clearly show they plan more regulating than deregulating. As Table 8 exhibits, 69 long-term actions are deemed regulatory and 56 are deemed deregulatory. More noteworthy is that, after four years of Trump, only two economically significant long-term deregulatory actions were listed as planned by agencies. By contrast, 13 were deemed regulatory. Likewise, the “other significant” category contains 49 planned regulatory actions and only 16 deregulatory ones, a ratio of three to one.

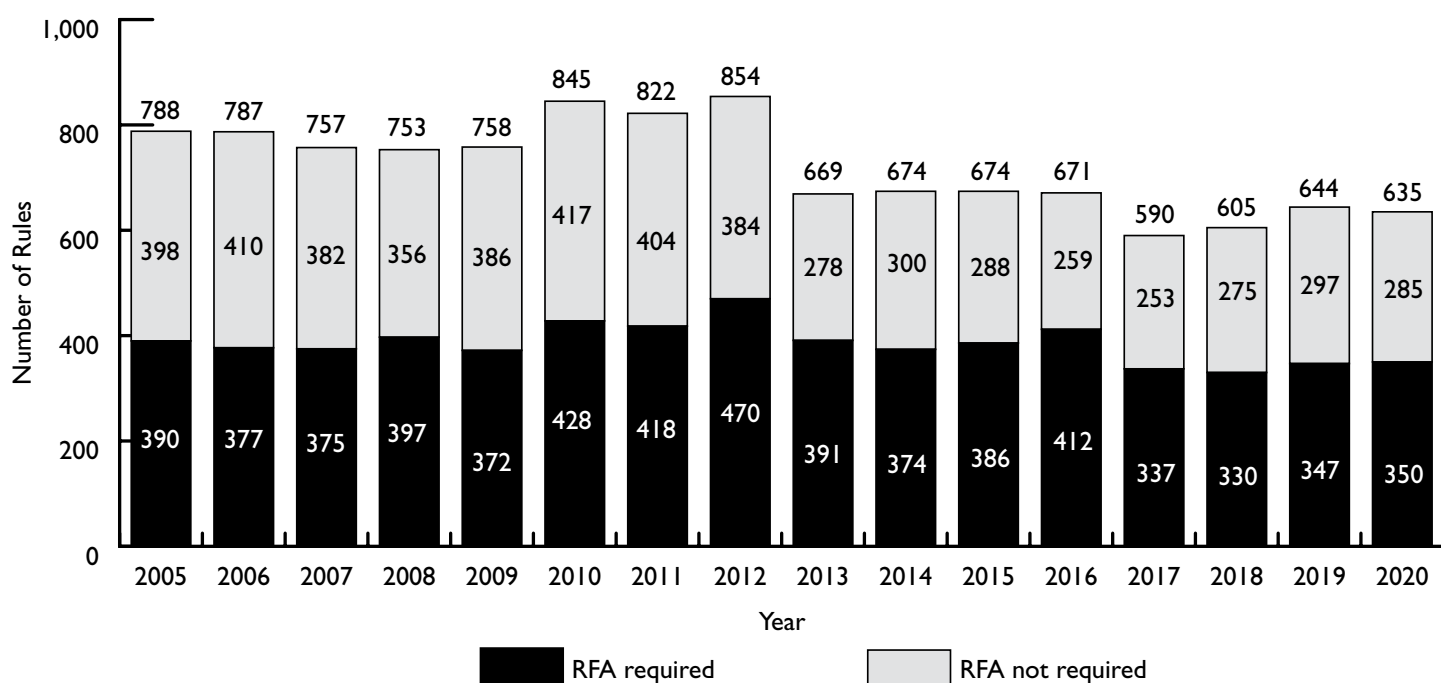
Such trends are warning signs because these more costly rule subsets are presumably where tomorrow’s cost savings need to come from. The “long-term” category in particular illustrates how regulatory liberalization will require congressional action. But like the debt and deficit, no bipartisan wherewithal exists to address it.

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*More costly rule subsets are presumably where tomorrow’s cost savings need to come from.*

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Figure 21. Rules in the Pipeline Affecting Small Business, 2005–2020



Sources: Compiled from “The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions,” *Federal Register*, Fall edition, various years.

Rolling back longstanding regulations requires going through the public notice-and-comment process. It takes time, which works to the advantage of agencies that are seeking to expand and maintain their authority.

## Federal Regulations Affecting Small Business

The Regulatory Flexibility Act (RFA) directs federal agencies to assess their rules’ effects on small businesses.<sup>618</sup> Figure 21 depicts the number of rules requiring such annual regulatory flexibility analysis. It also portrays other rules anticipated by agencies to affect small business, but that purportedly do not rise to the level of requiring a regulatory flexibility analysis. The number of rules acknowledged to significantly affect small business dropped substantially after 2012 during the Obama administration, in part reflecting reporting changes noted, but they dropped even more substantially under Trump, amplified by some rules comprising rollbacks.

At the end of 2020, the total number of rules affecting small business stood at 635 (compared with 644, 605, and 590 in the prior three years). Of those, 350 required RFA analysis and another 285 were otherwise deemed by agencies to affect small business but not require RFA analysis.<sup>619</sup> There had been 671 small-business rules in Obama’s final year. Before the 2013 drop and flat trajectory since then, the number of rules with small-business impacts during the Obama administration regularly exceeded 800, a level not seen since 2003.

Table 11 breaks out the 2019 fall Unified Agenda’s 635 rules affecting small business by department, agency, and commission. The top five—the Departments of Commerce, Health and Human Services, and the Treasury, along with the Federal Communications Commission and the multiagency Federal Acquisition Regulations—accounted for 310, or 49 percent, of the 635 rules affecting small business. The average of those during Obama’s eight years, 406, exceeded George W. Bush’s eight-year average of 377.



Trump's average annual number of rules affecting small business was lower than either Bush's or Obama's, at 341, and a number of those were deregulatory.

Recall that 653 rules among the Unified Agenda's flow of 3,852 are flagged as deregulatory. Of the 635 rules with small-business effects, 83 are deregulatory, compared with 102 in both 2019 and 2018, and 83 in 2017. The overall proportion of total rules affecting small business stands at 16.5 percent, but varies widely among agencies (see Table 9). (For the numbers of rules affecting small business broken down by department and agency for fall Agenda editions since 1996, see Appendix: Historical Tables, Part H.)

Box 4 depicts a partial list of the basic, non-sector-specific laws and regulations that affect small business, stacking as they grow.

## Federal Regulations Affecting State and Local Governments

*Ten Thousand Commandments* primarily emphasizes regulations imposed on the private sector. However, state and local officials' realization during the 1990s that their own priorities were being overridden by federal mandates generated demands for reform. As a result, the Unfunded Mandates Act was enacted in 1995 and required the Congress-

**Table 11. Unified Agenda Entries Affecting Small Business by Department, Agency, and Commission, Fall 2019**

	Total Rules	Number Affecting Small Business							Affecting Small Business	Top 5
		RFA Required			RFA Not Required			Total		
		Active	Completed	L-T	Active	Completed	L-T			
Dept. of Agriculture	164	9	2	3	2	3	1	20	12.2%	
Dept. of Commerce	312	33	12	3	16	14	3	81	26.0%	81
Dept. of Defense	234	6	1		1			8	3.4%	
Dept. of Education	23		1					1	4.3%	
Dept. of Energy	153	4			3			7	4.6%	
Dept. of Health and Human Services	250	21	13	2	21	4	1	62	24.8%	62
Dept. of Homeland Security	155	9	3	11	1	2	5	31	20.0%	
Dept. of Housing and Urban Development	52							0	0.0%	
Dept. of the Interior	306	6	1		8	1	2	18	5.9%	
Dept. of Justice	108				5	2		7	6.5%	
Dept. of Labor	92	6	1	2	11	3	1	24	26.1%	
Dept. of State	71				28	3		31	43.7%	
Dept. of Transportation	301	10		4	13	1	9	37	12.3%	
Dept. of the Treasury	394	5	1		36	3	5	50	12.7%	50
Dept. of Veterans Affairs	81							0	0.0%	
Agency for International Development	17							0	0.0%	
Architectural and Transportation Barriers Compliance Board	2							0	0.0%	
CPBSD*	4							0	0.0%	

\* Committee for Purchase from People Who Are Blind or Severely Disabled.

	Total Rules	Number Affecting Small Business							Affecting Small Business	Top 5
		RFA Required			RFA Not Required			Total		
		Active	Completed	L-T	Active	Completed	L-T			
Commodity Futures Trading Commission	42		1					1	2.4%	
Consumer Financial Protection Bureau	21	2			7		6	15	71.4%	
Consumer Product Safety Commission	21	2	1	1				4	19.0%	
Corp. for National and Community Service	9							0	0.0%	
Council of Inspector General on Integrity and Efficiency	1									
Council on Environmental Quality	3							0	0.0%	
Court Seives/Offender Supervision, D.C.	7							0	0.0%	
Environmental Protection Agency	232	3		3			1	7	3.0%	
Equal Employment Opportunity Commission	15				5	1		6	40.0%	
Farm Credit Administration	19							0	0.0%	
Federal Acquisition Regulation	61	41	8		8	2		59	96.7%	59
Federal Communications Commission	79		2	53			3	58	73.4%	58
Federal Deposit Insurance Corporation	56				2	1	1	4	7.1%	
Federal Energy Regulatory Commission	12							0	0.0%	
Federal Housing Finance Agency	14							0	0.0%	
Federal Maritime Commission	3							0	0.0%	
Federal Mediation and Conciliation Service	4						1	1	25.0%	
Federal Mine Safety and Health Review Commission	2							0	0.0%	
Federal Permitting Improvement Steering Committee	3	3								
Federal Reserve System	46		1	1				2	4.3%	
Federal Trade Commission	20				16	2		18	90.0%	
General Services Administration	32	13			15	2		30	93.8%	
Institute of Museum and Library Services	2							0	0.0%	
National Aeronautics and Space Administration	10							0	0.0%	
National Archives and Records Administration	9							0	0.0%	
National Credit Union Administration	32							0	0.0%	

	Total Rules	Number Affecting Small Business							Affecting Small Business	Top 5
		RFA Required			RFA Not Required			Total		
		Active	Completed	L-T	Active	Completed	L-T			
National Endowment for the Arts	6				1		1	2	33.3%	
National Endowment for the Humanities	5							0	0.0%	
National Indian Gaming Commission	10							0	0.0%	
National Labor Relations Board	4							0	0.0%	
National Mediation Board	1							0	0.0%	
National Science Foundation	1									
National Transportation Safety Board	6							0	0.0%	
Nuclear Regulatory Commission	56	1	1	1				3	50.0%	
Office of Government Ethics	13							0	0.0%	
Office of Management and Budget	9	1	1					2	15.4%	
Office of Personnel Management	51							0	0.0%	
Office of National Drug Control Policy	2									
Office of the U.S.Trade Representative	2									
Peace Corps	6							0	0.0%	
Pension Benefit Guaranty Corporation	12							0	0.0%	
Presidio Trust	3							0	0.0%	
Postal Regulatory Commission	5							0	0.0%	
Railroad Retirement Board	7							0	0.0%	
Securities and Exchange Commission	80	13	6	9	1		1	30	37.5%	
Small Business Administration	65	10		2				12	18.5%	
Social Security Administration	19							0	0.0%	
Surface Transportation Board	10	1						1	10.0%	
U.S.Agency for Global Media	4							0	0.0%	
U.S. Commission on Civil Rights	1							0	0.0%	
TOTAL	3,852	199	56	95	200	44	41	635	16.5%	310
		350			285					49% of total
Deregulatory		22	11	5	28	15	2	83		

Source: Compiled from "The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions," and from online edition at [www.reginfo.gov](http://www.reginfo.gov).  
RFA = regulatory flexibility analysis; L-T = long term.

sional Budget Office to produce cost estimates of mandates affecting state, local, and tribal governments above the then-threshold of \$50 million.

As Figure 22 shows, agencies report that 258 of the 3,852 rules in the fall 2020 Agenda pipeline will affect local governments, an increase of 11 percent over the past year after a larger rise the year prior. That includes all stages—active, completed, and long-term.<sup>620</sup> Since the passage of the Unfunded Mandates Act in the mid-1990s, the number of overall rules affecting local governments has fallen by 51 percent, from 533. Meanwhile, the total number of regulatory actions affecting

state governments stands at 409, a 6 percent rise over 2019 after an 18 percent jump the year before. The pipeline count of active, completed, and long-term rules had been trending downward in years prior to those jumps, but the tallies now include deregulatory actions. In the 2020 Agenda, 46 local and 72 state actions are deemed deregulatory for Executive Order 13771 purposes, across the active, completed, and long-term categories. (The deregulatory counts in 2019 were 45 local actions and 69 state ones.)

Unfunded federal mandates on state and local governments remain an issue that could influence overall regulatory reform mea-

## Box 4. Federal Workplace Regulations Affecting Growing Businesses

*Assumes nonunion, nongovernment contractor, with interstate operations and a basic employee benefits package. Includes general workforce-related regulation only. Omitted are (a) categories such as environmental and consumer product safety regulations and (b) regulations applying to specific types of businesses, such as mining, farming, trucking, or financial firms.*

### 1 EMPLOYEE

- Fair Labor Standards Act (overtime and minimum wage [27 percent minimum wage increase since 1990])
- Social Security matching and deposits
- Medicare, Federal Insurance Contributions Act (FICA)
- Military Selective Service Act (allowing 90 days leave for reservists; rehiring of discharged veterans)
- Equal Pay Act (no sex discrimination in wages)
- Immigration Reform Act (eligibility must be documented)
- Federal Unemployment Tax Act (unemployment compensation)
- Employee Retirement Income Security Act (standards for pension and benefit plans)
- Occupational Safety and Health Act
- Polygraph Protection Act

### 4 EMPLOYEES: ALL THE ABOVE, PLUS

- Immigration Reform Act (no discrimination with regard to national origin, citizenship, or intention to obtain citizenship)

### 15 EMPLOYEES: ALL THE ABOVE, PLUS

- Civil Rights Act Title VII (no discrimination with regard to race, color, national origin, religion, or sex; pregnancy-related protections; record keeping)
- Americans with Disabilities Act (no discrimination, reasonable accommodations)

### 20 EMPLOYEES: ALL THE ABOVE, PLUS

- Age Discrimination Act (no discrimination on the basis of age against those 40 and older)
- Older Worker Benefit Protection Act (benefits for older workers must be commensurate with younger workers)
- Consolidation Omnibus Budget Reconciliation Act (COBRA) (continuation of medical benefits for up to 18 months upon termination)

### 25 EMPLOYEES: ALL THE ABOVE, PLUS

- Health Maintenance Organization Act (HMO Option required)
- Veterans' Reemployment Act (reemployment for persons returning from active, reserve, or National Guard duty)

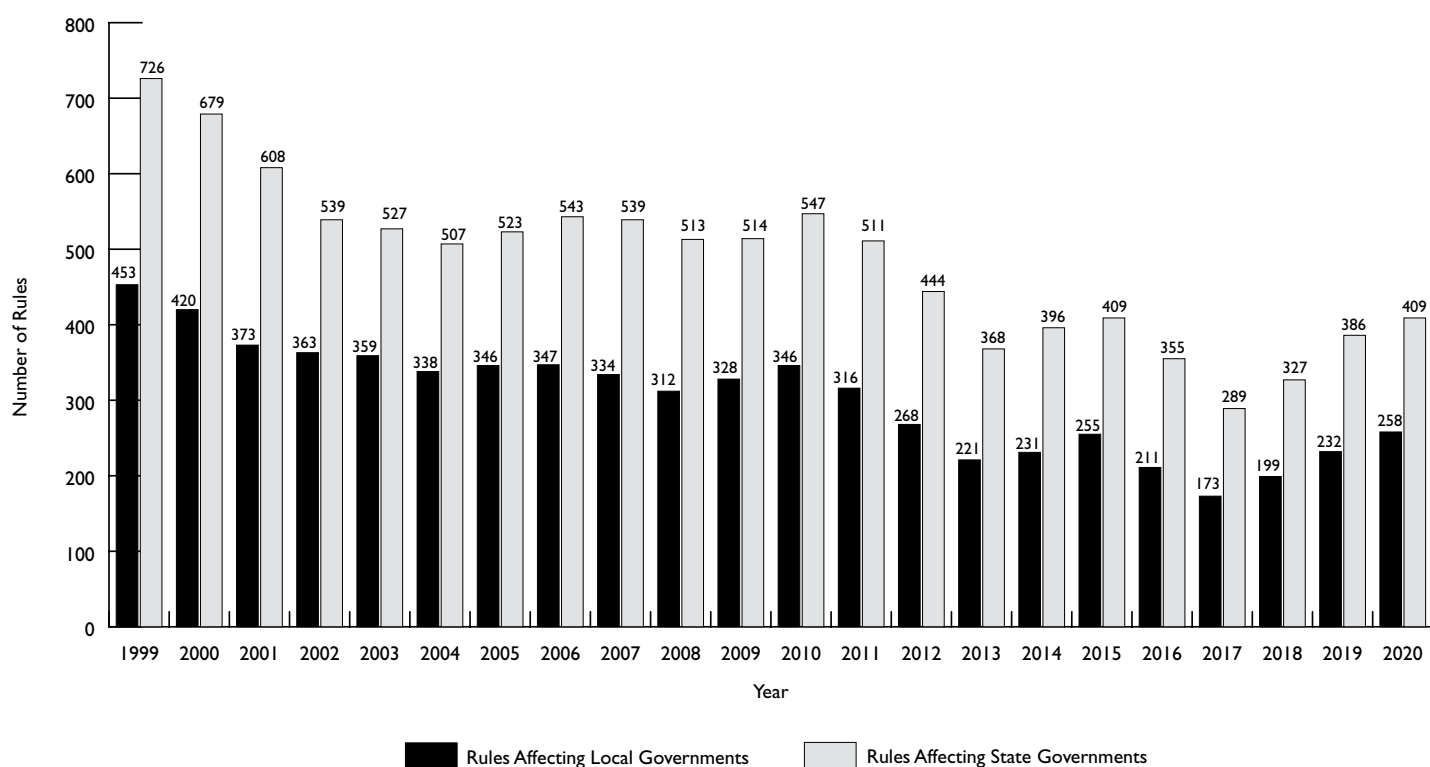
### 50 EMPLOYEES: ALL THE ABOVE, PLUS

- Family and Medical Leave Act (12 weeks unpaid leave to care for newborn or ill family member)

### 100 EMPLOYEES: ALL THE ABOVE, PLUS

- Worker Adjusted and Retraining Notification Act (60-days written plant closing notice)
- Civil Rights Act (annual EEO-I form)

Figure 22. Rules Affecting State and Local Governments, 1999–2020



Sources: Compiled from “The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions,” *Federal Register*, various years’ editions, and from online edition at <http://www.reginfo.gov>.

asures. At the 2016 Legislative Summit of the National Conference of State Legislatures (NCSL) in Chicago, the NCSL Standing Committee on Budgets and Revenue issued a resolution on unfunded mandates asserting, “The growth of federal mandates and other costs that the federal government imposes on states and localities is one of the most serious fiscal issues confronting state and local government officials.”<sup>621</sup> The NCSL called for “reassessing” and “broadening” the 1995 Unfunded Mandates Reform Act. Likewise, state attorneys general in 2016 wrote to House and Senate leadership over federal agencies’ “failing to fully consider the effect of their regulations on States and state law,” and called for strengthening the Administrative Procedure Act.<sup>622</sup>

The Congressional Budget Office reports that since 2006, 190 laws have imposed intergovernmental mandates on states and

localities, with 420 mandates within these laws.<sup>623</sup> Regulatory mandates can derive from such laws, as well as from agencies acting unilaterally. According to official data, few have imposed costs on states and localities exceeding the noted statutory threshold (aggregate direct costs during any of the mandate’s first five years of \$50 million in 1996; \$77 million now), but this should be examined further.

Agencies claim very few of the rules affecting states and localities impose unfunded mandates on them, but that may be because the Unfunded Mandates Reform Act is not applicable to many rules and programs (see Figure 22).<sup>624</sup> Nonetheless, following are some notable completed or pending regulations over the past decade that federal agencies have acknowledged in the Unified Agenda as unfunded mandates (with their Regulation Identifier Number provided<sup>625</sup>).

## *Department of Agriculture*

- USDA/FNS: National School Lunch and School Breakfast Programs: Nutrition Standards for All Foods Sold in School, as Required by the Healthy, Hunger-Free Kids Act of 2010 (0584-AE09)
- USDA/RBS: Debt Settlement—Community and Business Programs (0570-AA88)

## *Department of Health and Human Services*

- HHS/FDA: Combinations of Bronchodilators with Expectorants; Cold, Cough, Allergy, Bronchodilator, and Anti-Asthmatic Drug Products for Over-the-Counter Human Use (0910-AH16)
- HHS/CMS: CY 2016 Notice of Benefit and Payment Parameters (CMS-9944-P) (0938-AS19)
- HHS/FDA: Over-the-Counter Drug Review—Internal Analgesic Products (0910-AF36)
- HHS/CDC: Establishment of Minimum Standards for Birth Certificates (0920-AA46)
- HHS/FDA: Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents (0910-AG33)

## *Department of Justice*

- DOJ/LA: Supplemental Guidelines for Sex Offender Registration and Notification (1105-AB36)
- DOJ/CRT: Nondiscrimination on the Basis of Disability in State and Local Government Services (1190-AA46)

## *Department of Labor*

- DOL/OSHA: Occupational Exposure to Crystalline Silica (1218-AB70)

## *Department of Transportation*

- DOT/PHMSA: Hazardous Materials: Real-Time Emergency Response Information by Rail (2137-AF21)
- DOT/FHWA: Real-Time System Management Information Program (2125-AF19)

## *Architectural and Transportation Barriers Compliance Board*

- ATBCB: Americans with Disabilities Act Accessibility Guidelines for Transportation Vehicles (3014-AA38)

## *Environmental Protection Agency*

- EPA/OW: National Primary Drinking Water Regulations (2040-AA94, 2040-AF15)
- EPA/OCSP: Polychlorinated Biphenyls; Reassessment of Use Authorizations for PCBs in Small Capacitors in Fluorescent Light Ballasts in Schools and Day Cares (2070-AK12)
- EPA/WATER: Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category (2040-AF14)
- EPA/SWER: Revising Underground Storage Tank Regulations—Revisions to Existing Requirements and New Requirements for Secondary Containment and Operator Training (2050-AG46)
- EPA/SWER: Standards for the Management of Coal Combustion Residuals Generated by Commercial Electric Power Producers (Coal Ash) (2050-AE81)
- EPA/AR: Control of Air Pollution from Motor Vehicles: Tier 3 Motor Vehicle Emission and Fuel Standards (2060-AQ86)
- EPA/AR: National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters; Reconsideration (2060-AR13)

- EPA/AR: National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Electric Utility Steam Generating Units (2060-AP52)
- EPA/AR: National Emission Standards for Hazardous Air Pollutants (NESHAP) from Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Electric Utility Steam Generating Units—Appropriate and Necessary Finding (2060-AR31)
- EPA/AR: NESHAP for Area Sources: Industrial, Commercial, and Institutional Boilers (2060-AM44)
- EPA/AR: NESHAP for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters (2060-AQ25)
- EPA/AR: NESHAP: Portland Cement Notice of Reconsideration and New Source Performance Standards for Portland Cement (2060-AO15)

### ***Nuclear Regulatory Commission***

- NRC: Revision of Fee Schedules (3150-AI93)

# Government Accountability Office

## Database on Regulations

The various federal reports and databases on regulations serve different purposes:

- The *Federal Register* shows the aggregate number of proposed and final rules—both those that affect the private sector and those that deal with internal government procedures or programs—and numerous notices and presidential documents.
- The Unified Agenda depicts agency regulatory priorities and provides detail about the number of rules at various stages in the regulatory pipeline, rules with economically significant effects, and rules affecting small businesses and state and local governments.

The 1996 Congressional Review Act (CRA) requires agencies to submit reports to Congress on their major rules—those with annual estimated costs of \$100 million or more. Owing to such reports, which are prepared and maintained in a database at the Government Accountability Office, one can more readily observe (a) which of the thousands of final rules that agencies issue each year are major (to the extent the directive is obeyed) and (b) which departments and agencies are producing the major rules.<sup>626</sup>

The CRA gives Congress a window of 60 legislative days in which to review a received major rule and pass a resolution of disapproval rejecting the rule. Despite the issuance of thousands of rules since the CRA's passage, including dozens of major rules, before 2017, only one had been rejected: the Department of Labor's rule on workplace repetitive-motion injuries in early 2001. Since the start of the 115th Congress in January

2017, the CRA has been used 16 times to overturn regulations.<sup>627</sup> According to recent analysis, however, some final rules are not being properly submitted to the GAO and to Congress as required under the CRA, and major guidance is rarely submitted.<sup>628</sup>

Major rules can add burdens, reduce them, implement delays, or set rates and standards for major government programs like Medicaid. Table 12 depicts the number of final major rule reports issued by the GAO regarding agency rules through calendar year 2020. Based on a search of the GAO's database, 90 major rules were reported in 2020 (80 in 2019), a significant increase from the 55 in 2018 and 49 in 2017.<sup>629</sup> The 119 major rule reports in 2016 under Obama (disregarding inauguration dates) were the highest count since this tabulation began at the GAO following passage of the CRA; the 100 rules in 2010 were the second highest. The 49 under Trump in 2017 were the lowest count since these records began, followed by 50 in 2003.

There are several categories of significant rules.<sup>630</sup> An economically significant rule is major, but a major rule is not necessarily economically significant, so there are fewer economically significant rules than major ones (see Table 13). The basic relationship is as follows: Economically significant includes major, which includes significant. Both economically significant and major rules qualify as significant. Numbers of each over the past four years appears as follows:

Note that the economically significant rule counts are larger than the GAO's count of major or significant rules in some instances.



Table 12. Government Accountability Office Reports on Major Rules as Required by the Congressional Review Act, 2001–2020

	2020	2019	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001
Department of Agriculture	3	8	5	2	5	7	8	4	2	4	6	12	3	7	8	6	7	4	7	9
Department of Commerce	2		1	1				2				2	1	2		1	1			2
Department of Defense	2	1		1	2	2	1				4	4	6			1		2	3	
Department of Education	1	6		3	2	1	2	5	4	2	5	6	2	1	2					
Department of Energy	4		2	4	8	2	6	3	1	5	4	7	3	3				1	1	3
Department of Health and Human Services	11	22	19	16	38	18	27	24	23	24	24	17	24	19	16	22	22	17	13	15
Department of Homeland Security	5	2	2		5	3	2	2	1	1	3	1	5	4	2	3	2	2		
Department of Housing and Urban Development				1	2	1				2	1	1	2			1	1			1
Department of Justice		4	2		1				1	1	3				1	1	1		3	4
Department of Labor	1		1	2	8	1	3	3	3	2	6	1	2	3	3	1	1		2	3
Department of the Interior	4	2	5	3	6	6	6	6	7	6	7	7	10	5	6	6	8	7	7	8
Department of State			1						1		1		1							
Department of Transportation	3	1	1		4	3	3	3	2	2	5	6	8	3	1	3	5	4	6	3
Department of the Treasury	16	13		2	5	7	6	3	2	1	4		1	1	1		1	1		1
Department of Veterans Affairs	1	3	3	1	1	4	3	1	1	2	2	2		1		1		2	1	3
Architectural Barriers Compliance Board				1													1			
Commodity Futures Trading Commission					4		1	4	9	6										
Consumer Financial Protection Bureau				3	2	2		4	1	1										
Consumer Product Safety Commission										1					1					
Emergency Oil and Gas Loan Board																				
Emergency Steel Guarantee Loan Board																				
Environmental Protection Agency			1	2	7	8	2	3	5	6	8	3	9	2	8	3	7	3	1	4
Equal Employment Opportunity Commission										1										



Table 13. Number of Significant and Major Rules

		<b>Completed Economically Significant*</b>	<b>Major per GAO**</b>	<b>Major Per Unified Agenda***</b>	<b>Significant****</b>
2016	Obama	83	119	96	486
2017	Trump	88	48	102	199
2018	Trump	35	54	43	108
2019	Trump	70	74	84	66
2020	Trump	97	90	133	79

\* From Unified Agenda by (loosely) “fiscal” year; see Figure 20’s completed economically significant rules.

\*\* From GAO database by calendar year.

\*\*\* From Unified Agenda.

\*\*\*\* From Federal Register.gov advanced search of “significant” final rules; these may be found at [www.tenthousandcommandments.com](http://www.tenthousandcommandments.com).

There may be different explanations, such as (a) calendar and fiscal years not aligning, (b) rules not being reported to the GAO but being noted at OMB, (c) independent agency rules appearing under different categorizations in various databases, or (d) differing treatment of budget/transfer rules. An executive order or legislation to systematize nomenclature could help bring greater clarity, reconcile record keeping across various government databases, and subject independent agencies to greater oversight by Congress and the public.<sup>631</sup>

According to the GAO compilation, President Barack Obama issued 691 major rules

over eight years, compared with President George W. Bush’s 504 over eight years. (This presentation uses calendar years, so Bush’s eight years contain the final weeks of President Bill Clinton’s presidency, before Bush’s inauguration, and Obama’s first year includes the Bush administration’s final weeks.) President Bush averaged 63 major rules annually during his eight years in office. President Obama averaged 86, a 36 percent higher average annual output than that of Bush. Trump issued an average of almost 69 major rules annually—49 in 2017, 55 in 2018, 80 in 2019, and 90 in 2020—some of which were deregulatory.

# Liberate to Stimulate

Policy makers frequently propose spending stimulus to grow or strengthen economies. That was certainly the case in the year of COVID-19. A regulatory liberalization stimulus, on the other hand, can offer confidence and certainty for businesses and entrepreneurs.

Sometimes, businesses value regulatory stability over streamlining of rules.<sup>632</sup> “Why do so many CEOs welcome the seemingly hostile Biden’s victory?” asks *Fortune*’s Geoff Colvin.

The big, general reason many business leaders are fine with a President Biden is that they can’t take the tumult any longer. Business prizes stability, predictability, certainty. Trump’s incessant whipsawing on some of the largest issues—imposing tariffs, closing borders, retaliating against companies, leaving NATO—has exhausted businesspeople. As many of them say privately, they can compete so long as they know the rules, but can’t if the rules are constantly changing.<sup>633</sup>

While there is value in stability, it need not be incompatible with regulatory streamlining. A future executive branch could take further steps beyond what Trump did on streamlining, such as requiring rules and guidance to be submitted to Congress and the GAO as required by the CRA. In addition, executive orders could (a) require review of independent agency rules, (b) reinstate principles for guidance document preparation and disclosure, and (c) ensure preparation of the annual aggregate regulatory cost estimate already required by law.

## Improving Regulatory Disclosure

Certainly, some regulations’ benefits exceed costs under the parameters of guidance to agencies, such as OMB Circular A-4, but for the most part net benefits or actual costs are not subject to quantification.<sup>634</sup> Without more thorough regulatory accounting than we get today—backed up by congressional certification of what agencies specifically do—it is difficult to know whether society wins or loses as a result of rules.<sup>635</sup>

Pertinent and relevant regulatory data should be compiled, summarized, and made readily available to the public. One important step toward better disclosure would be for Congress to require—or for the administration or OMB to initiate—publication of a summary of available but scattered data. Such a regulatory transparency report card could resemble some of the presentation in *Ten Thousand Commandments*.

Accountability is even more important than disclosure. Congress routinely delegates legislative power to unelected agency personnel. Reining in off-budget regulatory costs can occur only when elected representatives are held responsible and end “regulation without representation.” Stringent limitations on delegation, such as requiring congressional approval of rules, are essential.

As detailed earlier, regulations fall into two broad classes: (a) those that are economically significant or major (with effects exceeding \$100 million annually) and (b) those that are not. Agencies tend to emphasize reporting of economically significant or major rules, which OMB also highlights in its an-

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*Policy makers frequently propose spending stimulus to grow or strengthen economies. That was certainly the case in the year of COVID-19.*

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Table 14. A Possible Breakdown of Economically Significant Rules

Category	Breakdown
1	> \$100 million, < \$500 million
2	> \$500 million, < \$1 billion
3	> \$1 billion, < \$5 billion
4	> \$5 billion, < \$10 billion
5	> \$10 billion

nual regulatory reports. A problem with this approach is that many rules that technically come in below that threshold can still be very significant in real-world terms.

Under current policy, agencies need not specify whether any or all of their economically significant or major rules cost just above the \$100 million threshold or far above it. One helpful reform would be for Congress to require agencies to break up their cost categories into tiers, as depicted in Table 14. Agencies could classify their rules on the basis of either (a) cost information that has been provided in the regulatory impact analyses that accompany some economically significant rules or (b) separately performed internal or external estimates.

Furthermore, much of the available but scattered regulatory information is difficult to compile or interpret. To learn about regulatory trends and acquire information on rules, interested citizens once needed to comb through the Unified Agenda's 1,000-plus pages of small, multicolumn print. Fortunately, today it is easier to compile results from online searches and agencies' regulatory plans and sites like Regulations.gov. Data from the Unified Agenda could be made still more accessible and user-friendly if elements of it were officially summarized in charts and presented as a section in the federal budget, in the Agenda itself, or in the *Economic Report of the President*. Suggested components of this Regulatory Transparency Report Card appear in Box 5.<sup>636</sup>

In addition to revealing burdens, impacts, and trends, such a breakdown would reveal more clearly what we do *not* know about the

regulatory state, for example, the percentage of rules for which their issuing agencies failed to quantify either their costs or benefits.

Furthermore, the accumulation of regulatory guidance documents, memoranda, and other regulatory dark matter to implement policy underscores the need for greater disclosure than exists now. These kinds of agency issuances can be regulatory in effect but are nowhere to be found in the Unified Agenda. Inventorying such dark matter is difficult, but formal attempts began in 2020 in response to Executive Order 13891 that are worth maintaining.<sup>637</sup> Legislation such as the Guidance Out of Darkness Act would help address many of the shortcomings in guidance disclosure.

In addition, observers have little ability to distinguish whether rules are regulatory or deregulatory, beyond what was implemented by Executive Order 13771, with its "deregulatory" designation and the fiscal year-end "Regulatory Reform Results" reports.<sup>638</sup> Similarly, future regulatory reforms should require regulatory and deregulatory actions to be classified separately in the *Federal Register* and for agencies' confusing array of rule classifications to be harmonized.<sup>639</sup> Current reporting distinguishes poorly between rules and guidance documents affecting the private sector and those affecting internal government operations. It also should be improved.

Building on these principles and basic frameworks, additional information could be incorporated as warranted—for example, success or failure of special initiatives such

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*Observers have little ability to distinguish whether rules are regulatory or deregulatory.*

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## Box 5. Regulatory Transparency Report Card, Recommended Official Summary Data by Program, Agency, and Grand Total, with Five-Year Historical Tables

- Tallies of “economically significant” rules and minor rules by department, agency, and commission.
- Tallies of significant and other guidance documents, memoranda, and other “regulatory dark matter” by department, agency, and commission.
- Numbers and percentages of executive and independent agency rules deemed “Deregulatory” for E.O. 13,771 purposes.
- Numbers and percentages of rules affecting small business, Deregulatory component.
- Depictions of how regulations and guidance accumulate as a small business grows.
- Additional agency rules subject to Regulatory Impact Analysis and other scrutiny.
- Aggregate cost estimates of regulation by category: paperwork, economic, social, health and safety, environmental.
- Tallies of existing cost estimates, including subtotals by agency and grand total.
- Numbers and percentages of regulations that contain numerical cost estimates.
- Numbers and percentages lacking cost estimates, with explanation.
- Analysis of the Federal Register, including number of pages and proposed and final rule breakdowns by agency.
- Number of major rules reported on by the Government Accountability Office in its database of reports on regulations.
- Number and percentage of agency rules and guidance documents presented to Congress in accordance with the Congressional Review Act.
- Ranking of most active rulemaking agencies.
- Rules that only affect internal agency procedures.
- Number of rules new to the Unified Agenda, number of rules carried over from previous years.
- Numbers and percentages of rules facing statutory or judicial deadlines that limit executive branch ability to restrain them or for which weighing costs and benefits is statutorily prohibited.
- Percentage of rules reviewed by the Office of Management and Budget and actions taken.

as executive branch restructuring or updates on ongoing regulatory reform or disclosure campaigns. Providing historical tables for all elements of the regulatory enterprise would prove useful to scholars, third-party researchers, members of Congress, and the public. By making agency activity more explicit, a regulatory transparency report card would help ensure that policy makers take the growth of the administrative state seriously.

### Ending Regulation without Representation: The “Unconstitutionality Index”—19 Rules for Every Law

Regulatory agencies do not answer to voters. Yet in a sense, regulators, rather than the elected Congress, do the bulk of U.S. lawmaking. As Columbia University legal scholar Phillip Hamburger has described,

the rise of the modern administrative state runs counter to the Constitution, which “expressly bars the delegation of legislative power.”<sup>640</sup> But agencies are not the primary offenders. For too long, Congress has shirked its constitutional duty to make the tough calls. Instead, it routinely delegates substantial lawmaking power to agencies and then fails to ensure that they deliver benefits that exceed costs.

The primary measure of an agency’s productivity—other than growth of its budget and number of employees—is the body of regulation it produces.<sup>641</sup> Agencies face significant incentives to expand their turf by regulating even without established need. It is hard to blame agencies for carrying out the very regulating they were set up to do in the first place. Better to point a finger at Congress.

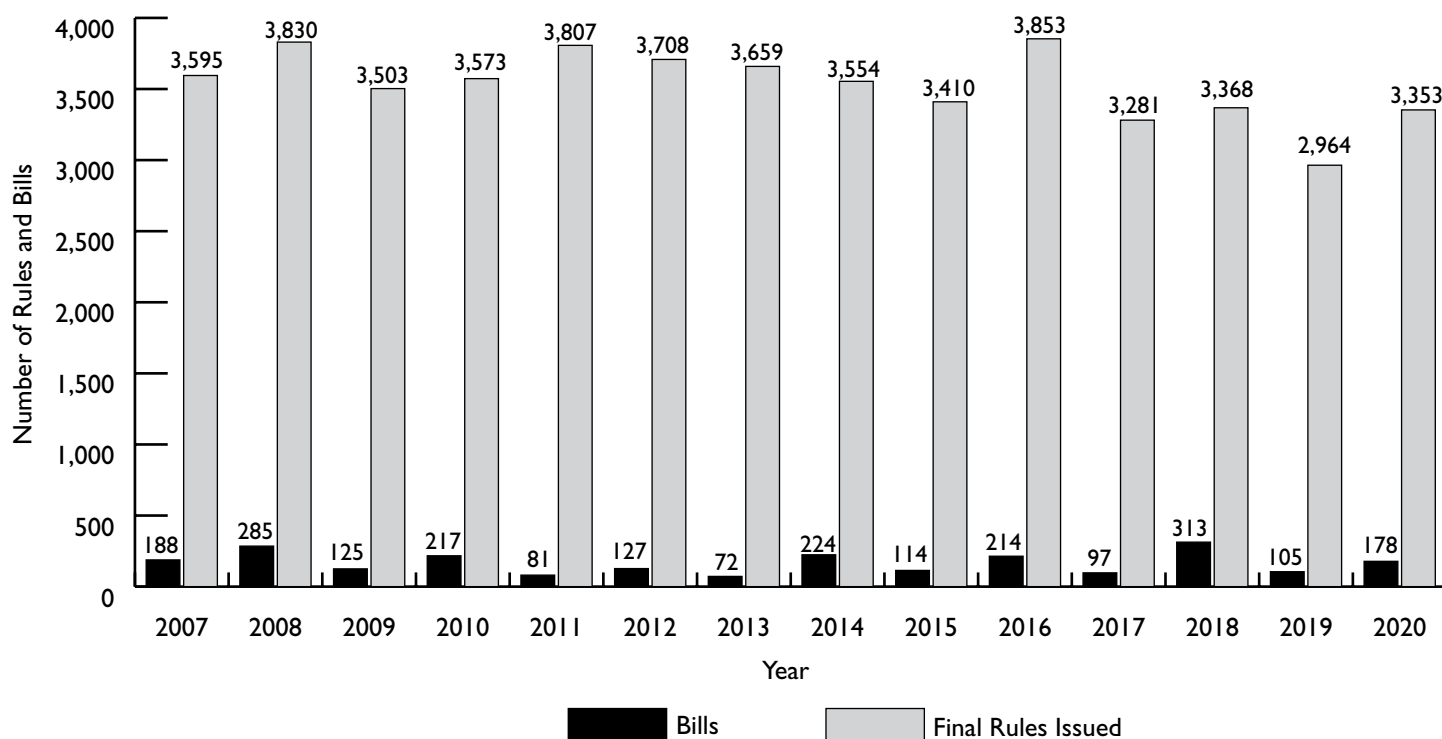
The “Unconstitutionality Index” is the ratio of rules issued by agencies relative to

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*In a sense, regulators, rather than the elected Congress, do the bulk of U.S. lawmaking.*

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Figure 23. The Unconstitutionality Index, 2007–2020



Source: *Federal Register* data from National Archives and Records Administration and from Crews tabulation at <http://www.tenthousandcommandments.com>. Public Laws data compiled from Government Printing Office, Public and Private Laws at <http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=PLAW>; and from National Archives, Previous Sessions: Public Law Numbers at <http://www.archives.gov/federal-register/laws/past/index.html>.

19 agency rules for every law passed by Congress.

*By regulating instead of spending, government can expand almost indefinitely without explicitly taxing anybody one extra penny.*

laws passed by Congress and signed by the president. In calendar year 2020, federal regulatory agencies issued 3,353 final rules, whereas the 116th Congress passed and President Trump signed into law 178 bills (the corresponding figure in 2019 was 105 bills).<sup>642</sup> That means nearly 19 rules were issued for every law passed in 2020 (there were 28 in 2019 and 11 in 2018; see Figure 23).

The number of rules and laws can vary for many reasons, but the Unconstitutionality Index still provides some context, with anecdotes, about rules. The Unconstitutionality Index average over the past decade has been 28 rules issued for every law passed. However, in the Trump era’s streamlining context, the fact that eliminating a rule requires issuing a new one meant that the Index, ironically, was “worsened” by deregulation. (Appendix: Historical Tables, Part I, depicts

the “Unconstitutionality Index” dating back to 1993 and shows the numbers of executive orders and the numbers of agency notices, which could arguably be incorporated into the Index.) Of course, rules issued by agencies are not usually related to the current year’s laws; typically, agencies’ rules comprise the administration of prior years’ legislative measures.

Mounting debt and deficits, now at unprecedented levels, can incentivize Congress to regulate rather than to increase government spending to accomplish policy ends. By regulating instead of spending, government can expand almost indefinitely without explicitly taxing anybody one extra penny. For example, if Congress wanted to boost job training, funding a program to do so would require legislative approval of a new appropriation for the Department of Labor, which would

appear in the federal budget and increase the deficit. Instead, Washington could try to induce Fortune 500 companies to implement job training programs, to be carried out according to new regulations issued by the Department of Labor. The latter option would add little to federal spending but would still let Congress take credit for the program.

Moreover, agency guidance and executive orders now constitute a significant part of government activity, so non-legislative policy making should be a major issue of concern and subject to greater disclosure.

An annual regulatory transparency report card is needed, but is not the complete response. Regulatory reforms that rely on agencies policing themselves within the limited restraints of the Administrative Procedure Act will not rein in the growth of the regulatory state or address the problem of regulation without representation. Rather, Congress should vote on agencies' final rules before rules become binding on the public. Affirmation of new major and controversial regulations would ensure that Congress bears direct responsibility for every dollar of new regulatory costs.

The Regulations from the Executive in Need of Scrutiny Act (REINS) Act (S. 68, 117th Congress) offers one such approach.<sup>643</sup> It would require Congress to vote on all economically significant agency regulations. It passed the House in previous Congresses but has not moved forward in the Senate. To avoid getting bogged down in approving

myriad agency rules, Congress could vote on agency regulations in bundles. Another way to expedite the process is via congressional approval or disapproval of new regulations by voice vote rather than by tabulated roll-call vote. What matters most is that members of Congress go on record for the laws the public must heed.

If Congress does not act, states could step in. The Constitution provides for states to check federal power, and pressure from states could prompt Congress to act. Many state legislators have indicated support for the Regulation Freedom Amendment, which reads, in its entirety: "Whenever one quarter of the members of the U.S. House or the U.S. Senate transmit to the president their written declaration of opposition to a proposed federal regulation, it shall require a majority vote of the House and Senate to adopt that regulation."<sup>644</sup>

Congressional—rather than agency—approval of regulatory laws and their costs should be the main goal of reform. When Congress ensures transparency and disclosure and finally assumes responsibility for the growth of the regulatory state, the resulting system will be one that is fairer and more accountable to voters. Legislative regulatory reform and executive branch streamlining are parts of more fundamental debates. Congress is responsible for the fiscal budget, yet deficits remain the norm. The larger questions are over the role and legitimacy of the administrative state and the role of government in a constitutional republic.



# Appendix: Historical Tables

## Part A. Federal Register Page History, 1936–2020

Year	Unadjusted Page Count	Jumps/Blanks	Adjusted Page Count
1936	2,620	n/a	2,620
1937	3,450	n/a	3,450
1938	3,194	n/a	3,194
1939	5,007	n/a	5,007
1940	5,307	n/a	5,307
1941	6,877	n/a	6,877
1942	11,134	n/a	11,134
1943	17,553	n/a	17,553
1944	15,194	n/a	15,194
1945	15,508	n/a	15,508
1946	14,736	n/a	14,736
1947	8,902	n/a	8,902
1948	9,608	n/a	9,608
1949	7,952	n/a	7,952
1950	9,562	n/a	9,562
1951	13,175	n/a	13,175
1952	11,896	n/a	11,896
1953	8,912	n/a	8,912
1954	9,910	n/a	9,910
1955	10,196	n/a	10,196
1956	10,528	n/a	10,528
1957	11,156	n/a	11,156
1958	10,579	n/a	10,579
1959	11,116	n/a	11,116
1960	14,479	n/a	14,479
1961	12,792	n/a	12,792
1962	13,226	n/a	13,226
1963	14,842	n/a	14,842
1964	19,304	n/a	19,304
1965	17,206	n/a	17,206
1966	16,850	n/a	16,850
1967	21,088	n/a	21,088
1968	20,072	n/a	20,072
1969	20,466	n/a	20,466
1970	20,036	n/a	20,036
1971	25,447	n/a	25,447
1972	28,924	n/a	28,924
1973	35,592	n/a	35,592

Year	Unadjusted Page Count	Jumps/Blanks	Adjusted Page Count
1974	45,422	n/a	45,422
1975	60,221	n/a	60,221
1976	57,072	6,567	50,505
1977	65,603	7,816	57,787
1978	61,261	5,565	55,696
1979	77,498	6,307	71,191
1980	87,012	13,754	73,258
1981	63,554	5,818	57,736
1982	58,494	5,390	53,104
1983	57,704	4,686	53,018
1984	50,998	2,355	48,643
1985	53,480	2,978	50,502
1986	47,418	2,606	44,812
1987	49,654	2,621	47,033
1988	53,376	2,760	50,616
1989	53,842	3,341	50,501
1990	53,620	3,825	49,795
1991	67,716	9,743	57,973
1992	62,928	5,925	57,003
1993	69,688	8,522	61,166
1994	68,108	3,194	64,914
1995	67,518	4,873	62,645
1996	69,368	4,777	64,591
1997	68,530	3,981	64,549
1998	72,356	3,785	68,571
1999	73,880	2,719	71,161
2000	83,294	9,036	74,258
2001	67,702	3,264	64,438
2002	80,332	4,726	75,606
2003	75,798	4,529	71,269
2004	78,852	3,177	75,675
2005	77,777	3,907	73,870
2006	78,724	3,787	74,937
2007	74,408	2,318	72,090
2008	80,700	1,265	79,435
2009	69,644	1,046	68,598
2010	82,480	1,075	81,405
2011	82,415	1,168	81,247
2012	80,050	1,089	78,961
2013	80,462	1,151	79,311
2014	78,796	1,109	77,687
2015	81,402	1,142	80,260
2016	97,069	1,175	95,894
2017	61,950	642	61,308
2018	68,082	857	67,225
2019	72,564	128	72,436
<b>2020</b>	<b>87,347</b>	<b>991</b>	<b>86,356</b>

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

Publication of proposed rules was not required before the Administrative Procedure Act of 1946. Preambles to rules were published only to a limited extent before the 1970s.

n/a = not available.

## Part B. Number of Documents in the *Federal Register*, 1976–2020

Year	Final Rules	Proposed Rules	Other*	Total
1976	7,401	3,875	27,223	38,499
1977	7,031	4,188	28,381	39,600
1978	7,001	4,550	28,705	40,256
1979	7,611	5,824	29,211	42,646
1980	7,745	5,347	33,670	46,762
1981	6,481	3,862	30,090	40,433
1982	6,288	3,729	28,621	38,638
1983	6,049	3,907	27,580	37,536
1984	5,154	3,350	26,047	34,551
1985	4,843	3,381	22,833	31,057
1986	4,589	3,185	21,546	29,320
1987	4,581	3,423	22,052	30,056
1988	4,697	3,240	22,047	29,984
1989	4,714	3,194	22,218	30,126
1990	4,334	3,041	22,999	30,374
1991	4,416	3,099	23,427	30,942
1992	4,155	3,170	24,063	31,388
1993	4,369	3,207	24,017	31,593
1994	4,867	3,372	23,669	31,908
1995	4,713	3,339	23,133	31,185
1996	4,937	3,208	24,485	32,630
1997	4,584	2,881	26,260	33,725
1998	4,899	3,042	26,313	34,254
1999	4,684	3,281	26,074	34,039
2000	4,313	2,636	24,976	31,925
2001	4,132	2,512	25,392	32,036
2002	4,167	2,635	26,250	33,052
2003	4,148	2,538	25,168	31,854
2004	4,101	2,430	25,846	32,377
2005	3,943	2,257	26,020	32,220
2006	3,718	2,346	25,429	31,493
2007	3,595	2,308	24,784	30,687
2008	3,830	2,475	25,574	31,879
2009	3,503	2,044	25,218	30,765
2010	3,573	2,439	26,543	32,555
2011	3,807	2,898	26,296	33,001
2012	3,708	2,517	24,755	30,980
2013	3,659	2,594	24,517	30,770
2014	3,554	2,383	24,257	30,194
2015	3,410	2,342	24,294	30,046
2016	3,853	2,419	24,912	31,184
2017	3,281	1,834	22,132	27,247
2018	3,368	2,098	22,349	27,815
2019	2,964	2,131	22,181	27,276
<b>2020</b>	<b>3,353</b>	<b>2,149</b>	<b>22,806</b>	<b>28,308</b>

Rules since 1993: 111,065; rules since 1975: 208,155; other since 1975: 1,133,465.

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

\*“Other” documents are presidential documents, agency notices, and corrections. n/a = not available at time of writing.

# Part C. Code of Federal Regulations Page Counts and Number of Volumes, 1975–2019

Year	Actual Pages Published (includes text, preliminary pages, and tables)				Unrevised CFR Volumes**	Total Pages Complete CFR	Total CFR Volumes (exclud- ing Index)
	Titles 1–50 (minus Title 3)	Title 3 (POTUS Docs)	Index*	Total Pages Published			
1975	69,704	296	792	70,792	432	71,224	133
1976	71,289	326	693	72,308	432	72,740	139
1977	83,425	288	584	84,297	432	84,729	141
1978	88,562	301	660	89,523	4,628	94,151	142
1979	93,144	438	990	94,572	3,460	98,032	148
1980	95,043	640	1,972	97,655	4,640	102,295	164
1981	103,699	442	1,808	105,949	1,160	107,109	180
1982	102,708	328	920	103,956	982	104,938	177
1983	102,892	354	960	104,206	1,448	105,654	178
1984	110,039	324	998	111,361	469	111,830	186
1985	102,815	336	1,054	104,205	1,730	105,935	175
1986	105,973	512	1,002	107,487	1,922	109,409	175
1987	112,007	374	1,034	113,415	922	114,337	185
1988	114,634	408	1,060	116,102	1,378	117,480	193
1989	118,586	752	1,058	120,396	1,694	122,090	196
1990	121,837	376	1,098	123,311	3,582	126,893	199
1991	119,969	478	1,106	121,553	3,778	125,331	199
1992	124,026	559	1,122	125,707	2,637	128,344	199
1993	129,162	498	1,141	130,801	1,427	132,228	202
1994	129,987	936	1,094	132,017	2,179	134,196	202
1995	134,471	1,170	1,068	136,709	1,477	138,186	205
1996	129,386	622	1,033	131,041	1,071	132,112	204
1997	128,672	429	1,011	130,112	948	131,060	200
1998	132,884	417	1,015	134,316	811	135,127	201
1999	130,457	401	1,022	131,880	3,052	134,932	202
2000	133,208	407	1,019	134,634	3,415	138,049	202
2001	134,582	483	1,041	136,106	5,175	141,281	206
2002	137,373	1,114	1,039	139,526	5,573	145,099	207
2003	139,550	421	1,053	141,024	3,153	144,177	214
2004	143,750	447	1,073	145,270	2,369	147,639	217
2005	146,422	103	1,083	147,608	4,365	151,973	221
2006	149,594	376	1,077	151,047	3,060	154,107	222
2007	149,236	428	1,088	150,752	5,258	156,010	222
2008	151,547	453	1,101	153,101	4,873	157,974	222
2009	158,369	412	1,112	159,893	3,440	163,333	225
2010	152,455	512	1,122	154,089	11,405	165,494	226
2011	159,129	486	1,136	160,751	8,544	169,295	230
2012	164,884	472	1,154	166,510	8,047	174,557	235
2013	166,352	520	1,170	168,042	7,454	175,496	235
2014	165,016	538	1,170	166,724	12,657	179,381	236
2015	170,278	495	1,170	171,943	6,334	178,277	237
2016	174,769	570	1,170	176,509	8,544	185,053	242
2017	178,628	846	1,170	180,644	5,730	186,374	242
2018	170,952	608	1,170	172,730	12,718	185,448	242
2019	172,022	1,092	1,170	174,284	11,700	185,984	242

Source: Chart from National Archives and Records Administration, Office of the Federal Register.  
 \*General Index and Finding Aids volume for 1975 and 1976. \*\*Unrevised CFR volumes page totals include those previous editions for which a cover only was issued during the year or any previous editions for which a supplement was issued.

# Part D. Number of Regulatory Reviews at the Office of Information and Regulatory Affairs, 1991–2020

Year	Average Days Review Time										
	Prerule reviews	Proposed rule reviews	Interim final rule reviews	Final rule reviews	Notice reviews	Total reviews	ES reviews	Non-ES reviews	Days ES reviews	Days non-ES reviews	Overall average days
1991		1,201		1,322		2,523	142	2,381	39	29	29
1992		970		1,315		2,285	121	2,164	44	39	39
1993	2	976	6	1,155	28	2,167	106	2,061	53	42	43
1994	16	317	68	302	128	831	134	697	33	30	31
1995	8	225	64	270	53	620	74	546	41	35	35
1996	28	160	56	232	31	507	74	433	39	42	42
1997	20	196	64	174	51	505	81	424	47	54	53
1998	15	192	58	182	40	487	73	414	33	50	48
1999	19	247	71	214	36	587	86	501	51	53	53
2000	13	210	66	253	40	582	92	490	60	62	62
2001	9	274	95	285	37	700	111	589	46	60	58
2002	23	261	81	249	55	669	100	569	44	46	46
2003	23	232	92	309	59	715	101	614	42	50	49
2004	26	237	64	241	58	626	85	541	35	55	53
2005	18	221	66	247	59	611	82	529	39	59	57
2006	12	229	43	270	46	600	71	529	34	59	56
2007	22	248	44	250	25	589	85	504	49	64	61
2008	17	276	39	313	28	673	135	538	53	63	61
2009	28	214	67	237	49	595	125	470	33	40	39
2010	36	261	84	232	77	690	138	552	48	51	51
2011	24	317	76	262	61	740	117	623	51	60	58
2012	12	144	33	195	40	424	83	341	69	81	79
2013	11	177	33	160	37	418	104	314	121	143	137
2014	17	201	43	144	46	452	114	338	106	134	127
2015	8	178	29	164	35	415	130	285	84	90	88
2016	14	231	28	303	45	623	156	467	83	79	80
2017	13	84	12	103	24	237	70	167	56	74	68
2018	25	168	11	124	32	360	91	269	63	68	67
2019	26	234	25	147	41	474	117	357	77	80	79
2020	14	213	77	257	104	669	199	470	57	75	70

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

ES = economically significant.

## Part E. Unified Agenda Rules History, 1983–2020

### Total Number of Rules under Consideration or Enacted

1980s		
1983	April	2,863
	October	4,032
1984	April	4,114
	October	4,016
1985	April	4,265
	October	4,131
1986	April	3,961
	October	3,983
1987	April	4,038
	October	4,005
1988	April	3,941
	October	4,017
1989	April	4,003
	October	4,187

Sources: Compiled from “The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions,” *Federal Register*, various years’ editions; also from online edition at <http://www.reginfo.gov>.

\*Spring edition skipped in 2012.

1990s		
1990	April	4,332
	October	4,470
1991	April	4,675
	October	4,863
1992	April	4,186
	October	4,909
1993	April	4,933
	October	4,950
1994	April	5,105
	October	5,119
1995	April	5,133
	October	4,735
1996	April	4,570
	October	4,680
1997	April	4,417
	October	4,407
1998	April	4,504
	October	4,560
1999	April	4,524
	October	4,568

2000s		
2000	October	4,699
2001	October	4,509
2002	October	4,187
2003	December	4,266
2004	December	4,083
2005	October	4,062
2006	December	4,052
2007	December	3,882
2008	December	4,004
2009	December	4,043

2010s		
2010	December	4,225
2011	December	4,128
2012	Year-End*	4,062
2013	November	3,305
2014	November	3,415
2015	November	3,297
2016	November	3,318
2017	December	3,209
2018	October	3,534
2019	October	3,752

2020s		
2020	December	3,852

Sources: Compiled from “The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions,” *Federal Register*, various years’ editions; also from online edition at <http://www.reginfo.gov>.

\*Spring edition skipped in 2012.

## Part F:Agenda Rules History by Department and Agency, 2000–2017

	2019	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001
Department of Agriculture	185	114	114	140	155	160	159	276	265	287	327	374	290	311	292	279	323	314	312
Department of Commerce	294	279	247	231	246	270	250	415	328	296	300	325	303	302	296	273	300	270	342
Department of Defense	253	246	193	115	117	121	104	146	140	150	133	109	131	143	163	126	108	87	93
Department of Education	32	49	38	27	25	26	20	24	18	23	22	17	13	16	9	11	13	14	8
Department of Energy	134	97	87	97	107	105	92	108	96	96	85	54	47	63	61	50	66	53	61
Department of Health and Human Services	241	237	189	197	213	217	200	204	251	312	231	236	259	257	249	233	219	219	277
Department of Homeland Security	154	171	123	123	130	141	139	160	232	230	237	252	267	280	295	314	338		
Department of Housing and Urban Development	51	48	42	47	52	55	52	58	65	65	60	73	86	92	90	103	109	100	89
Department of Justice	86	70	68	94	100	102	95	112	120	137	121	138	140	139	124	125	122	249	229
Department of Labor	98	83	64	94	97	95	84	98	90	99	104	96	94	93	93	88	89	102	141
Department of State	77	75	64	38	44	47	41	63	35	30	18	27	28	28	24	21	15	41	32
Department of the Interior	296	233	183	285	288	324	353	320	325	259	277	287	264	305	303	287	295	298	423
Department of Transportation	295	298	255	240	210	216	220	232	224	223	230	200	199	215	227	301	365	543	511
Department of the Treasury	402	439	444	469	391	426	428	487	497	580	528	521	545	501	514	532	530	513	458
Department of Veterans Affairs	70	79	79	76	80	75	66	85	82	81	78	80	65	77	76	79	87	104	164
Advisory Council on Historic Preservation						1						0	0	0		1	1	1	0
Agency for International Development	13	8	9	14	8	7	5	10	14	14	12	7	10	8	10	8	8	7	6
American Battle Monuments Commission	1	1	2																
Architectural and Transportation Barriers Compliance Board	1	1	3	6	6	7	8	8	8	7	6	5	5	4	3	4	4	5	5
Broadcasting Board of Governors		3																	
Commission on Civil Rights		1	1	1	1	1	1		1	1	1	2	1	1	1	1	1	1	1
Commodity Futures Trading Commission	40	36	32	35	34	26	33	83	68	56	32	25	19	14	11	15	15	19	30
Consumer Financial Protection Bureau	19	22	29	26	23	21	26	34											
Consumer Product Safety Commission	26	29	29	43	45	37	33	48	38	51	39	31	19	24	18	18	20	20	21
Corporation for National and Community Service	8	7	6	6	7	6	4	5	13	10	7	7	9	11	11	8	9	16	9
Council of Inspector General on Integrity and Efficiency	4	1	2	1															
Council on Environmental Quality	2	2																	
Court Services/Offender Supervision, D.C.		5	6	4	4	3	3	3	3	2	2	2	2	1	1	1	3	7	5
CPBSD*	2	2	3	4	2	2	2	2	3	3	3	3	5	6	6	5	0	0	0
Defense Nuclear Facilities Safety Board			1																
Environmental Protection Agency	221	218	220	203	188	186	179	223	318	345	331	330	336	372	400	416	417	409	416
Equal Employment Opportunity Commission	10	7	8	10	8	8	9	9	7	7	7	5	7	8	6	3	4	4	3

	2019	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001
Export-Import Bank of the United States								1											
Farm Credit Administration	16	14	31	27	27	26	30	30	25	23	25	19	12	19	20	20	21	14	17
Farm Credit System Insurance Corporation				2					25		1	1	0	1	1	1	1	1	1
Federal Acquisition Regulation	60	53	43	40	42	36	40	50	51	85	55	44	36	42	44	45	49	43	48
Federal Communications Commission	93	83	106	122	133	132	132	118	103	147	145	143	145	139	143	146	134	141	145
Federal Council on the Arts and Humanities												1							
Federal Deposit Insurance Corporation	42	39	29	19	25	25	17	22	21	21	21	19	18	24	16	20	17	17	22
Federal Emergency Management Agency												0	0	0	0	0	0	24	30
Federal Energy Regulatory Commission	19	18	17	21	25	24	29	40	41	36	37	39	41	47	35	23	21	19	8
Federal Housing Finance Agency	12	18	14	20	20	19	20	32	25	27	30	10	3	8	8	9	11	9	12
Federal Housing Finance Board												3							
Federal Maritime Commission	2	2	4	6	8	7	6	4	8	4	6	3	4	3	5	7	11	8	7
Federal Mediation and Conciliation Service	2	1						1	1	2	2	2	1	1	2	2	3	4	3
Federal Mine Safety and Health Review Commission	4																		
Federal Reserve System	48	39	29	22	18	23	16	25	29	22	26	18	20	13	17	18	18	24	32
Financial Stability Oversight Council								2											
Federal Trade Commission	19	18	20	18	20	23	20	23	24	19	20	17	14	16	15	14	12	10	13
General Services Administration	27	31	20	23	21	25	18	21	29	34	49	54	26	34	33	27	37	40	35
Gulf Coast Ecosystem Restoration Council				2	4	4													
Institute of Museum and Library Services	4	1	1		1	1	3	3	1	2	1	2	1	1	4	3	6	5	5
National Aeronautics and Space Administration	8	10	12	12	14	22	23	37	46	26	32	19	11	15	20	27	34	13	17
National Archives and Records Administration	7	7	8	10	8	10	6	6	4	9	7	10	15	21	17	22	19	20	19
National Commission on Military, National, and Public Service	2																		
National Council on Disability					1														
National Credit Union Administration	20	20	23	15	26	22	24	31	28	24	24	22	24	29	27	26	27	20	22
National Endowment for the Arts	6	6	6	5	7	8	7	8			2	3	2	2	2	2	6	5	5
National Endowment for the Humanities	7	5	4	4	4	5	4	3	5	4	3	3	3	3	3	3	8	9	8
National Indian Gaming Commission	6	7	8	9	9	5	5	15	15	9	17	18	19	16	15	14	14	16	15
National Labor Relations Board	6	2	1			1	1	1											
National Mediation Board	2	1	1																
National Science Foundation			3	2	1	3	2	3	3	2	3	3	0	2	3	3	2	2	3
National Transportation Safety Board	6	5	8	17	15	14													
Nuclear Regulatory Commission	56	51	60	62	65	60	53	73	64	63	61	54	53	45	49	42	45	39	42



## Part F. Agenda Rules History by Department and Agency, 2000–2017 (continued)

	2019	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001
Office of Federal Housing Enterprise Oversight												10	9	8	6	4	4	7	9
Office of Government Ethics	11											10	9	8	6	4	4	7	9
Office of Management and Budget	9	7	6	8	5	6	4	4	5	7	7	6	9	8	7	7	9	10	11
Office of National Drug Control Policy		5	4	4	4	2	2	5	8	7	7	2	1	2	2	3	4	4	5
Office of Personnel Management	37				1														
Office of the Trade Representative			2	3															
Peace Corps	5	4	4	4	3	4	4	5	5	1	1	7	6	6	5	4	9	9	9
Pension Benefit Guaranty Corporation	14	16	17	13	12	12	13	13	12	10	10	12	12	13	9	6	4	6	11
Postal Regulatory Commission	5	4	3			2	2	2	1	3	2	2	3	0	0	0	0	0	0
Presidio Trust	2	4	4									0	0	0	2	2	1	2	2
Privacy and Civil Liberties Oversight Board	4		1				1					0	1	0	0	0	0	0	0
Railroad Retirement Board	7	6	4	2	1	1	1	1	1	1	1	3	2	6	5	6	11	13	13
Recovery Accountability and Transparency Board						3	3	2		1	3								
Securities and Exchange Commission	101	99	85	75	69	61	76	89	107	75	74	72	76	71	64	79	71	73	80
Selective Service System									1	1	1	1	1	1	1	1	1	1	1
Small Business Administration	40	30	29	30	33	30	30	43	48	51	39	26	28	32	34	29	33	40	37
Social Security Administration	15	31	27	36	42	39	44	49	53	63	58	64	63	53	68	59	64	63	85
Special Inspector General for Afghanistan Reconstruction			1	1				4											
Surface Transportation Board	9	7	10	20	12	8	9	10	11	5	5	6	4	7	3	4	5	5	4
Tennessee Valley Authority		1	1									0	0	0	0	0	2	2	3
U.S. Agency for Global Media	3																		
U.S. Chemical Safety and Hazard Investigation Board	1																		
U.S. Commission on Civil Rights	1																		
U.S. International Development Finance Corporation	1																		
Udall Institute for Environmental Conflict Res.												0	0	0	0	0	1	1	3
<b>TOTAL</b>	<b>3,752</b>	<b>3,534</b>	<b>3,209</b>	<b>3,318</b>	<b>3,297</b>	<b>3,415</b>	<b>3,305</b>	<b>4,062</b>	<b>4,128</b>	<b>4,225</b>	<b>4,043</b>	<b>4,004</b>	<b>3,882</b>	<b>4,052</b>	<b>4,062</b>	<b>4,083</b>	<b>4,266</b>	<b>4,187</b>	<b>4,509</b>

Sources: Compiled from “The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions,” *Federal Register*, various years’ editions; and from online edition at <http://www.reginfo.gov>.

\*Committee for Purchase from People Who Are Blind or Severely Disabled.

## Part G. List of 261 Economically Significant Rules in the Pipeline, Fall 2020

Source: Compiled by Clyde Wayne Crews Jr. from “The Regulatory Plan and the Unified Agenda of Federal Regulatory and Deregulatory Actions,” *Federal Register*, and from online edition at <http://www.reginfo.gov>.

The “Regulation Identifier Number” or RIN appears at the end of each entry. 36 Deregulatory actions highlighted in **bold face**; 76 regulatory actions highlighted in *italics*.

### Active Rulemakings, 261 actions, 20 Deregulatory, 51 Regulatory

#### DEPARTMENT OF AGRICULTURE

1. USDA/FSA, Final Rule Stage, Quality Loss Adjustment Program, 0560-AI55
2. USDA/RBS, Final Rule Stage, Band I CARES Act Guaranteed Loan Program, 0570-AB07
3. USDA/RUS, Final Rule Stage, Rural Broadband Grant, Loan, and Loan Guarantee Program, 0572-AC46
4. USDA/RUS, Final Rule Stage, Rural eConnectivity Program (ReConnect Program), 0572-AC51
5. USDA/NRCS, Final Rule Stage, Regional Conservation Partnership Program (RCPP), 0578-AA70
6. **USDA/AMS, Final Rule Stage, Establishment of a Domestic Hemp Production Program, 0581-AD82**
7. *USDA/FSIS, Final Rule Stage, Revision of the Nutrition Facts Panels for Meat and Poultry Products and Updating Certain Reference Amounts Customarily Consumed, 0583-AD56*
8. *USDA/FNS, Proposed Rule Stage, Strengthening Integrity and Reducing Retailer Fraud in the Supplemental Nutrition Assistance Program (SNAP), 0584-AE71*
9. *USDA/FNS, Proposed Rule Stage, Supplemental Nutrition Assistance Program: Procedural Requirements for Households that Have Zero Gross Countable Income and Include a Work Registrant, 0584-AE76*
10. **USDA/FNS, Proposed Rule Stage, Child Nutrition Programs: Restoration of Milk, Whole Grains, and Sodium Flexibilities, 0584-AE81**
11. *USDA/FNS, Final Rule Stage, Revision of Categorical Eligibility in the Supplemental Nutrition Assistance Program (SNAP), 0584-AE62*
12. *USDA/FNS, Final Rule Stage, Supplemental Nutrition Assistance Program (SNAP): Standardization of State Heating and Cooling Standard Utility Allowances, 0584-AE69*
13. *USDA/FNS, Final Rule Stage, Supplemental Nutrition Assistance Program Requirement for Interstate Data Matching, 0584-AE75*

#### DEPARTMENT OF COMMERCE

14. DOC/NOAA, Final Rule Stage, Taking and Importing Marine Mammals: Taking Marine Mammals Incidental to Geophysical Surveys Related to Oil and Gas Activities in the Gulf of Mexico, 0648-BB38

#### DEPARTMENT OF DEFENSE

15. DOD/DARC, Final Rule Stage, Assessing Contractor Implementation of Cybersecurity Requirements (DFARS Case 2019-D041), 0750-AK81
16. DOD/OS, Final Rule Stage, National Industrial Security Program Operating Manual (NISPOM), 0790-AK85

#### DEPARTMENT OF EDUCATION

17. ED/OPE, Final Rule Stage, Federal-State Relationship Agreements, Pell Grant, ACG, National Smart Grant and LEAP, 1840-AD46
18. ED/OPE, Final Rule Stage, Total and Permanent Disability Discharge of Loans Under Title IV of the Higher Education Act, 1840-AD48
19. ED/OPE, Final Rule Stage, Student Eligibility-General, and Approved State Process, 1840-AD51

#### DEPARTMENT OF ENERGY

20. DOE/ENDEP, Proposed Rule Stage, Executive Order 13920 “Securing the United States Bulk-Power System” (BPS E.O.), 1901-AB53
21. DOE/EE, Proposed Rule Stage, Energy Conservation Standards for Manufactured Housing, 1904-AC11
22. DOE/EE, Proposed Rule Stage, Energy Conservation Standards for Residential Non-Weatherized Gas Furnaces and Mobile Home Gas Furnaces, 1904-AD20
23. DOE/EE, Proposed Rule Stage, Energy Conservation Standards for Commercial Water Heating Equipment, 1904-AD34
24. DOE/OGC, Proposed Rule Stage, Convention on Supplementary Compensation for Nuclear Damage Contingent Cost Allocation, 1990-AA39

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

25. *HHS/FDA, Proposed Rule Stage, Medication Guide; Patient Medication Information, 0910-AH68*
26. **HHS/FDA, Proposed Rule Stage, Institutional Review Boards; Cooperative Research, 0910-AI08**
27. *HHS/FDA, Proposed Rule Stage, Nutrient Content Claims, Definition of Term: Healthy, 0910-AI13*
28. *HHS/FDA, Proposed Rule Stage, Tobacco Product Standard for Characterizing Flavors in Cigars, 0910-AI28*
29. *HHS/FDA, Proposed Rule Stage, Requirements for Additional Traceability Records for Certain Foods, 0910-AI44*
30. *HHS/FDA, Proposed Rule Stage, Revising the National Drug Code Format and Drug Labeling Barcode Requirements, 0910-AI52*
31. *HHS/FDA, Final Rule Stage, General and Plastic Surgery Devices: Restricted Sale, Distribution, and Use of Sunlamp Products, 0910-AH14*
32. *HHS/FDA, Final Rule Stage, Prohibition of Sale of Tobacco Products to Persons Younger than 21 Years of Age, 0910-AI51*
33. *HHS/OIG, Final Rule Stage, Removal of Safe Harbor Protection for Rebates to Plans or PBMs Involving Prescription Pharmaceuticals and Creation of New Safe Harbor Protection, 0936-AA08*
34. *HHS/OIG, Final Rule Stage, Revisions to the Safe Harbors Under the Anti-Kickback Statute and Beneficiary Inducements Civil Monetary Penalties Rules Regarding Beneficiary Inducement, 0936-AA10*
35. *HHS/CMS, Prerule Stage, CY 2021 Inpatient Hospital Deductible and Hospital and Extended Care Services Coinsurance Amounts (CMS-8074), 0938-AU14*
36. *HHS/CMS, Prerule Stage, CY 2021 Part A Premiums for the Uninsured Aged and for Certain Disabled Individuals Who Have Exhausted other Entitlements (CMS-8075), 0938-AU15*
37. *HHS/CMS, Prerule Stage, Medicare Part B Monthly Actuarial Rates, Premium Rates, and Annual Deductible Beginning January 1, 2021 (CMS-8076), 0938-AU16*
38. *HHS/CMS, Proposed Rule Stage, Conditions for Coverage for End-Stage Renal Disease Facilities—Third Party Payments (CMS-3337), 0938-AT11*
39. *HHS/CMS, Proposed Rule Stage, Miscellaneous Medicare Secondary Payer Clarifications and Updates (CMS-6047), 0938-AT85*
40. *HHS/CMS, Proposed Rule Stage, Medicare Coverage of Innovative Technology (MCIT) and Definition of “Reasonable and Necessary” (CMS-3372), 0938-AT88*
41. *HHS/CMS, Proposed Rule Stage, Medicaid Programs Reducing Provider and Patient Burden, and Promoting Patients’ Electronic Access to Health Information (CMS-9123), 0938-AT99*
42. *HHS/CMS, Proposed Rule Stage, Medicaid and Children’s Health Insurance Program (CHIP); Strengthening the Program Integrity of the Medicaid and CHIP Eligibility Determination Process (CMS-2421), 0938-AU00*
43. *HHS/CMS, Proposed Rule Stage, HHS Notice of Benefit and Payment Parameters for 2022 (CMS-9914), 0938-AU18*
44. *HHS/CMS, Proposed Rule Stage, Federal Funding for Medicaid Enterprise Systems (CMS-2433), 0938-AU20*
45. *HHS/CMS, Proposed Rule Stage, Contract Year 2022 Policy and Technical Changes to the Medicare Advantage Program, Medicare Prescription Drug Benefit Program, Medicaid Program, and Medicare Cost Plan Program (CMS-4192), 0938-AU30*
46. *HHS/CMS, Proposed Rule Stage, FY 2022 Skilled Nursing Facility Prospective Payment System Rate Update and Quality Reporting Requirements (CMS-1746), 0938-AU36*
47. *HHS/CMS, Proposed Rule Stage, CY 2022 Home Health Prospective Payment System Rate Update, Home Infusion Therapy Services, and Quality Reporting Requirements (CMS-1747), 0938-AU37*
48. *HHS/CMS, Proposed Rule Stage, FY 2022 Inpatient Rehabilitation Facility (IRF) Prospective Payment System Rate Update and Quality Reporting Requirements (CMS-1748), 0938-AU38*
49. *HHS/CMS, Proposed Rule Stage, CY 2022 Changes to the End-Stage Renal Disease (ESRD) Prospective Payment System and Quality Incentive Program (CMS-1749), 0938-AU39*
50. *HHS/CMS, Proposed Rule Stage, FY 2022 Hospice Wage Index, Payment Rate Update, and Quality Reporting Requirements (CMS-1754), 0938-AU41*
51. *HHS/CMS, Proposed Rule Stage, CY 2022 Revisions to Payment Policies under the Physician Fee Schedule and other Revisions to Medicare Part B (CMS-1751), 0938-AU42*
52. *HHS/CMS, Proposed Rule Stage, CY 2022 Hospital Outpatient PPS Policy Changes and Payment Rates and Ambulatory Surgical Center Payment System Policy Changes and Payment Rates (CMS-1753), 0938-AU43*
53. *HHS/CMS, Proposed Rule Stage, Hospital Inpatient Prospective Payment Systems for Acute Care Hospitals; the Long-Term Care Hospital Prospective Payment System; and FY 2022 Rates (CMS-1752), 0938-AU44*
54. *HHS/CMS, Proposed Rule Stage, Medicaid Managed Care State Directed Payments (CMS-2439), 0938-AU50*
55. *HHS/CMS, Proposed Rule Stage, Alternative Payment Models (CMS-5532), 0938-AU51*

56. *HHS/CMS, Proposed Rule Stage, Amendments to Rules Governing Organ Procurement Organizations and Transplant Centers (CMS-3409), 0938-AU54*
  57. *HHS/CMS, Final Rule Stage, Durable Medical Equipment Fee Schedule, Adjustments to Resume the Transitional 50/50 Blended Rates to Provide Relief in Non-Competitive Bidding Areas (CMS-1687), 0938-AT21*
  58. *HHS/CMS, Final Rule Stage, International Pricing Index Model for Medicare Part B Drugs (CMS-5528), 0938-AT91*
  59. *HHS/CMS, Final Rule Stage, CY 2021 Revisions to Payment Policies under the Physician Fee Schedule and other Revisions to Medicare Part B (CMS-1734), 0938-AU10*
  60. *HHS/CMS, Final Rule Stage, CY 2021 Hospital Outpatient PPS Policy Changes and Payment Rates and Ambulatory Surgical Center Payment System Policy Changes and Payment Rates (CMS-1736), 0938-AU12*
  61. *HHS/CMS, Final Rule Stage, CY 2022 Inpatient Hospital Deductible and Hospital and Extended Care Services Coinsurance Amounts (CMS-8077), 0938-AU46*
  62. **HHS/OCR, Proposed Rule Stage, HIPAA Privacy: Changes to Support, and Remove Barriers to, Coordinated Care and Individual Engagement, 0945-AA00**
  63. *HHS/ONC, Final Rule Stage, Information Blocking and the ONC Health IT Certification Program: Extension of Compliance Dates and Timeframes in Response to the COVID-19 Public Health Emergency, 0955-AA02*
  64. *HHS/OS, Proposed Rule Stage, Department of Health and Human Services Promoting the Rule of Law through Transparency and Fairness in Civil Administrative Enforcement and Adjudication, 0991-AC18*
  65. **HHS/OS, Proposed Rule Stage, Securing Updated and Necessary Statutory Evaluations Timely, 0991-AC24**
  66. *HHS/OS, Final Rule Stage, Direct Regulatory Clean Up Initiative, 0991-AC19*
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71. *DHS/USCIS, Final Rule Stage, Strengthening the H-1B Nonimmigrant Visa Classification Program, 1615-AC13*
  72. *DHS/USCIS, Final Rule Stage, Collection and Use of Biometrics by U.S. Citizenship and Immigration Services, 1615-AC14*
  73. *DHS/USCBP, Proposed Rule Stage, Western Hemisphere Travel Initiative—Noncompliant Traveler Fee, 1651-AB06*
  74. *DHS/USCBP, Proposed Rule Stage, Collection of Biometric Data from Aliens upon Entry to and Exit from the United States, 1651-AB12*
  75. *DHS/USCBP, Final Rule Stage, Air Cargo Advance Screening , 1651-AB04*
  76. *DHS/USICE, Proposed Rule Stage, Visa Security Program Fee, 1653-AA77*
  77. *DHS/USICE, Final Rule Stage, Establishing a Fixed Time Period of Admission and an Extension of Stay Procedure for Nonimmigrant Academic Students, Exchange Visitors, and Representatives of Foreign Information Media, 1653-AA78*
  78. *DHS/FEMA, Proposed Rule Stage, Cost of Assistance Estimates in the Disaster Declaration Process for the Public Assistance Program, 1660-AA99*
  79. *DHS/FEMA, Final Rule Stage, Emergency Management Priorities and Allocations System, 1660-AB04*

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

80. *HUD/HUDSEC, Final Rule Stage, Housing and Community Development of 1980: Verification of Eligible Status, 2501-AD89*
81. *HUD/CPD, Final Rule Stage, Housing Trust Fund (FR-5246), 2506-AC30*

## DEPARTMENT OF THE INTERIOR

82. *DOI/FWS, Proposed Rule Stage, Migratory Bird Hunting; 2021–22 Migratory Game Bird Hunting Regulations, 1018-BE34*
83. *DOI/FWS, Proposed Rule Stage, Migratory Bird Hunting; 2022–23 Migratory Game Bird Hunting Regulations, 1018-BF07*
84. **DOI/ASLM, Proposed Rule Stage, Revisions to the Requirements for Exploratory Drilling on the Arctic Outer Continental Shelf, 1082-AA01**

## DEPARTMENT OF JUSTICE

85. **DOJ/DEA, Proposed Rule Stage, Implementation of the Provision of the Comprehensive Addiction and Recovery Act of 2016 Relating to the Partial Filling of**

## DEPARTMENT OF HOMELAND SECURITY

67. *DHS/USCIS, Proposed Rule Stage, Removing H-4 Dependent Spouses from the Classes of Aliens Eligible for Employment Authorization, 1615-AC15*
68. *DHS/USCIS, Proposed Rule Stage, Affidavit of Support on Behalf of Immigrants, 1615-AC39*
69. *DHS/USCIS, Proposed Rule Stage, Employment Authorization for Certain Classes of Aliens with Final Orders of Removal, 1615-AC40*
70. *DHS/USCIS, Proposed Rule Stage, Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions, 1615-AC61*

Prescriptions for Schedule II Controlled Substances, 1117-AB45

86. DOJ/DEA, Final Rule Stage, Implementation of the SUPPORT Act: Dispensing and Administering Controlled Substances for Medicated-Assisted Treatment, 1117-AB55

## DEPARTMENT OF LABOR

87. DOL/ETA, Final Rule Stage, Temporary Agricultural Employment of H-2A Nonimmigrants in the United States (Adverse Effect Wage Rates and H-2A Remaining Provisions), 1205-AB89
88. DOL/ETA, Final Rule Stage, Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States, 1205-AC00
89. DOL/EBSA, Final Rule Stage, Pension Benefit Statements-Lifetime Income Illustrations, 1210-AB20
90. DOL/EBSA, Final Rule Stage, Financial Factors in Selecting Plan Investments, 1210-AB95
91. DOL/OSHA, Prerule Stage, Emergency Response, 1218-AC91
92. DOL/WHd, Final Rule Stage, Tip Regulations Under the Fair Labor Standards Act, 1235-AA21
93. DOL/WHd, Final Rule Stage, Independent Contractor Status under the Fair Labor Standards Act, 1235-AA34
94. DOL/WHd, Final Rule Stage, High Wage Components of the Labor Value Content Requirements Under the United States-Mexico-Canada Agreement Implementation Act, 1235-AA36

## DEPARTMENT OF STATE

95. STATE, Proposed Rule Stage, Visas: Temporary Visitors for Business or Pleasure, 1400-AE95

## DEPARTMENT OF TRANSPORTATION

96. DOT/FAA, Proposed Rule Stage, Prohibit or Restrict the Operation of an Unmanned Aircraft in Close Proximity to a Fixed Site Facility, 2120-AL33
97. DOT/FAA, Proposed Rule Stage, Flight Attendant Duty Period Limitations and Rest Requirements, 2120-AL41
98. DOT/FMCSA, Final Rule Stage, Extension of Compliance Date for Entry Level Driver Training, 2126-AC25
99. DOT/NHTSA, Prerule Stage, Rear Seat Belt Reminder System, 2127-AL37
100. DOT/NHTSA, Prerule Stage, Retroreflective Tape and Underride Guards for Single Unit Trucks, 2127-AL57

101. DOT/NHTSA, Prerule Stage, Medium and Heavy-Duty Fuel Efficiency Standards, 2127-AM25

102. DOT/NHTSA, Final Rule Stage, Establish Side Impact Performance Requirements for Child Restraint Systems (MAP-21), 2127-AK95

103. DOT/NHTSA, Final Rule Stage, Corporate Average Fuel Economy Civil Penalties, 2127-AM32

104. DOT/PHMSA, Proposed Rule Stage, Pipeline Safety: Class Location Requirements, 2137-AF29

105. DOT/PHMSA, Final Rule Stage, Pipeline Safety: Gas Pipeline Regulatory Reform, 2137-AF36

## DEPARTMENT OF THE TREASURY

106. TREAS/DO, Final Rule Stage, Small Business Administration Business Loan Program Temporary Changes; Paycheck Protection Program—Additional Criteria for Seasonal Employers, 1505-AC67
107. TREAS/DO, Final Rule Stage, Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Loan Forgiveness, 1505-AC69
108. TREAS/DO, Final Rule Stage, Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Loan Forgiveness, 1505-AC70
109. TREAS/CUSTOMS, Final Rule Stage, Automated Commercial Environment Required for Electronic Entry/Entry Summary (Cargo Release and Related Entry) Filings, 1515-AE03
110. TREAS/IRS, Proposed Rule Stage, Guidance Related to the Foreign Tax Credit, Clarification of Foreign-Derived Intangible Income, 1545-BP70
111. TREAS/IRS, Proposed Rule Stage, Limitation on Deduction for Business Interest Expense, 1545-BP73
112. TREAS/IRS, Final Rule Stage, Rules for Denial of Deduction for Certain Fines, Penalties, and other Amounts, 1545-BO67
113. TREAS/IRS, Final Rule Stage, Section 451(b) Requirements, 1545-BO68
114. TREAS/IRS, Final Rule Stage, Rules Regarding Business Interest Limitation Under Section 163(j), 1545-BO73
115. TREAS/IRS, Final Rule Stage, Guidance on New Section 451(c), 1545-BO78
116. TREAS/IRS, Final Rule Stage, Guidance on the Elimination of Interbank Offered Rates, 1545-BO91
117. TREAS/IRS, Final Rule Stage, Section 4960 Excise Tax on Tax-Exempt Organization Compensation, 1545-BO99
118. TREAS/IRS, Final Rule Stage, Like-Kind Exchanges and Tax Reform, 1545-BP02
119. TREAS/IRS, Final Rule Stage, Allocation and Apportionment of Deductions and Foreign Taxes, Foreign Tax Redeterminations, FTC Disallowance under 965(g),

- Consolidated Groups, Hybrid Arrangements and Certain Payments under 951A, 1545-BP21
120. TREAS/IRS, Final Rule Stage, Consolidated Net Operating Losses, 1545-BP27
121. TREAS/IRS, Final Rule Stage, Revisions to the Section 168(k) Final Regulations, 1545-BP32
122. *TREAS/IRS, Final Rule Stage, Base Erosion and Anti-Abuse Tax Proposed Regulations, 1545-BP36*
123. *TREAS/IRS, Final Rule Stage, Credit for Carbon Oxide Sequestration, 1545-BP42*
124. *TREAS/IRS, Final Rule Stage, Guidance under Section 954(b)(4) (Rules for High-Taxed Subpart F Income) and Section 964 (Rules for Determining the Earnings and Profits of a Foreign Corporation), 1545-BP62*
125. TREAS/OCC, Final Rule Stage, Net Stable Funding Ratio, 1557-AD97
126. TREAS/OCC, Final Rule Stage, Regulatory Capital Rule: Money Market Mutual Fund Liquidity Facility, 1557-AE83

## **DEPARTMENT OF VETERANS AFFAIRS**

127. *VA, Proposed Rule Stage, Loan Guaranty: COVID-19 Veterans Assistance Partial Claim Payment Program, 2900-AR05*
128. VA, Proposed Rule Stage, Schedule for Rating Disabilities—Ear, Nose, Throat, and Audiology Disabilities; Special Provisions Regarding Evaluation of Respiratory Conditions; Respiratory System, 2900-AQ72
129. VA, Proposed Rule Stage, Schedule for Rating Disabilities—Neurological Conditions and Convulsive Disorders, 2900-AQ73
130. VA, Proposed Rule Stage, Schedule for Rating Disabilities; Mental Disorders, 2900-AQ82
131. VA, Proposed Rule Stage, Schedule for Rating Disabilities: the Digestive System, 2900-AQ90
132. VA, Proposed Rule Stage, Updating VA Adjudication Regulations for Disability or Death Benefit Claims Related to Herbicide Exposure, 2900-AR10
133. VA, Final Rule Stage, Schedule for Rating Disabilities; Musculoskeletal System and Muscle Injuries, 2900-AP88
134. VA, Final Rule Stage, Civilian Health and Medical Program of the Department of Veterans Affairs, 2900-AP02

## **ENVIRONMENTAL PROTECTION AGENCY**

135. *EPA/RODENVER, Final Rule Stage, Federal Implementation Plan for Oil and Natural Gas Sources; Uintah and Ouray Indian Reservation in Utah, 2008-AA03*

136. *EPA/OW, Final Rule Stage, National Primary Drinking Water Regulations for Lead and Copper: Regulatory Revisions, 2040-AF15*
137. *EPA/OAR, Proposed Rule Stage, Control of Air Pollution from New Motor Vehicles: Heavy-Duty Engine Standards: Cleaner Trucks Initiative, 2060-AU41*
138. *EPA/OAR, Proposed Rule Stage, Renewable Fuel Standard Program: Standards for 2021, Biomass-Based Diesel Volumes for 2022, 2060-AU82*
139. EPA/OAR, Proposed Rule Stage, Cross-State Air Pollution Rule Update Remand for the 2008 Ozone NAAQS, 2060-AU84
140. *EPA/OAR, Final Rule Stage, National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters: Amendments, 2060-AU20*
141. *EPA/OCSP, Final Rule Stage, Review of Dust-Lead Post-Abatement Clearance Levels, 2070-AK50*

## **CONSUMER PRODUCT SAFETY COMMISSION**

142. CPSC, Final Rule Stage, Regulatory Options for Table Saws, 3041-AC31

## **FEDERAL ACQUISITION REGULATION**

143. FAR, Final Rule Stage, Federal Acquisition Regulation (FAR); FAR Case 2019-009, Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment, 9000-AN92

## **FEDERAL HOUSING FINANCE ADMINISTRATION**

144. FHFA, Proposed Rule Stage, Enterprise Liquidity Requirements, 2590-AB09

## **FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL**

145. *FPISC, Proposed Rule Stage, Adding Land Revitalization as a Sector of Projects Eligible for Coverage Under Title 41 of the Fixing America's Surface Transportation Act (FAST-41), 3121-AA02*

## **NUCLEAR REGULATORY COMMISSION**

146. NRC, Proposed Rule Stage, Revision of Fee Schedules: Fee Recovery for FY 2021 [NRC-2018-0292], 3150-AK24

## OFFICE OF PERSONNEL MANAGEMENT

147. OPM, Final Rule Stage, Paid Parental Leave and Miscellaneous Family and Medical Leave Act, 3206-AN96

## SMALL BUSINESS ADMINISTRATION

148. SBA, Final Rule Stage, Business Loan Program Temporary Changes; Paycheck Protection Program, 3245-AH34
149. SBA, Final Rule Stage, Business Loan Program Temporary Changes; Paycheck Protection Program, 3245-AH35
150. SBA, Final Rule Stage, Business Loan Program Temporary Changes; Paycheck Protection Program—Additional Eligibility Criteria and Requirements for Certain Pledges of Loans, 3245-AH36
151. SBA, Final Rule Stage, Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Promissory Notes, Authorizations, Affiliation, and Eligibility, 3245-AH37
152. SBA, Final Rule Stage, Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Disbursements, 3245-AH38
153. SBA, Final Rule Stage, Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Corporate Groups and Non-Bank and Non-Insured Depository Institution Lenders, 3245-AH39
154. SBA, Final Rule Stage, Business Loan Program Temporary Changes; Paycheck Protection Program—Nondiscrimination and Additional Eligibility Criteria, 3245-AH40
155. SBA, Final Rule Stage, Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Extension of Limited Safe Harbor with Respect to Certification Concerning Need for PPP Loan Request, 3245-AH41
156. SBA, Final Rule Stage, Business Loan Program Temporary Changes; Paycheck Protection Program—Loan Increases, 3245-AH42
157. SBA, Final Rule Stage, Business Loan Program Temporary Changes; Paycheck Protection Program—Eligibility of Certain Electric Cooperatives, 3245-AH43
158. SBA, Final Rule Stage, Business Loan Program Temporary Changes; Paycheck Protection Program—Treatment of Entities with Foreign Affiliates, 3245-AH44
159. SBA, Final Rule Stage, Business Loan Program Temporary Changes; Paycheck Protection Program—Second Extension of Limited Safe Harbor with Respect to Certification Concerning Need for PPP Loan and Lender Reporting, 3245-AH45
160. SBA, Final Rule Stage, Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Loan Forgiveness, 3245-AH46
161. SBA, Final Rule Stage, Business Loan Program Temporary Changes; Paycheck Protection Program—SBA Loan Review Procedures and Related Borrower and Lender Responsibilities, 3245-AH47
162. SBA, Final Rule Stage, Business Loan Program Temporary Changes; Paycheck Protection Program—Eligibility of Certain Telephone Cooperatives, 3245-AH48
163. SBA, Final Rule Stage, Business Loan Program Temporary Changes; Paycheck Protection Program—Revisions to First Interim Final Rule, 3245-AH49
164. SBA, Final Rule Stage, Business Loan Program Temporary Changes; Paycheck Protection Program—Additional Revisions to First Interim Final Rule, 3245-AH50
165. SBA, Final Rule Stage, Business Loan Program Temporary Changes; Paycheck Protection Program—Revisions to the Third and Sixth Interim Final Rules, 3245-AH51
166. SBA, Final Rule Stage, Business Loan Program Temporary Changes; Paycheck Protection Program—Revisions to Loan Forgiveness and Loan Review Procedures Interim Final Rules, 3245-AH52
167. SBA, Final Rule Stage, Business Loan Program Temporary Changes; Paycheck Protection Program—Additional Eligibility Revisions to First Interim Final Rule, 3245-AH53
168. SBA, Final Rule Stage, Business Loan Program Temporary Changes; Paycheck Protection Program—Certain Eligible Payroll Costs, 3245-AH54
169. SBA, Final Rule Stage, Appeals of SBA Loan Review Decisions Under the Paycheck Protection Program, 3245-AH55
170. SBA, Final Rule Stage, Business Loan Program Temporary Changes; Paycheck Protection Program—Treatment of Owners and Forgiveness of Certain Nonpayroll Costs, 3245-AH56
171. SBA, Final Rule Stage, Business Loan Program Temporary Changes; Paycheck Protection Program—Consolidation of Interim Final Rules, 3245-AH58
172. SBA, Final Rule Stage, Business Loan Program Temporary Changes; Paycheck Protection Program—Additional Revisions to Loan Forgiveness and Loan Review Procedures Interim Final Rules, 3245-AH59
173. SSA, Final Rule Stage, Rules Regarding the Frequency and Notice of Continuing Disability Reviews, 0960-AI27

## Completed Actions, 58 actions, 14 Deregulatory, 12 Regulatory

### DEPARTMENT OF AGRICULTURE

- 174. USDA/AgSEC, Coronavirus Food Assistance Program, 0503-AA65
- 175. USDA/NRCS, Conservation Stewardship Program (CSP), 0578-AA67
- 176. USDA/NRCS, Environmental Quality Incentives Program (EQIP) Changes, 0578-AA68

### DEPARTMENT OF COMMERCE

- 177. DOC/PTO, Setting and Adjusting Patent Fees During Fiscal Year 2020, 0651-AD31

### DEPARTMENT OF EDUCATION

- 178. ED/OPE, Ensuring Student Access to High Quality and Innovative Postsecondary Educational Programs, 1840-AD38

### DEPARTMENT OF HEALTH AND HUMAN SERVICES

- 179. HHS/CDC, Control of Communicable Diseases; Foreign Quarantine: Suspension of the Right to Introduction and Prohibition of Introduction of Persons into United States from Designated Foreign Countries or Places, 0920-AA76
- 180. HHS/CMS, Medicaid Fiscal Accountability (CMS-2393), 0938-AT50
- 181. HHS/CMS, Modernizing and Clarifying the Physician Self-Referral Regulations (CMS-1720), 0938-AT64
- 182. HHS/CMS, Specialty Care Models to Improve Quality of Care and Reduce Expenditures (CMS-5527), 0938-AT89
- 183. HHS/CMS, Organ Procurement Organizations (OPOs) (CMS-3380), 0938-AU02
- 184. HHS/CMS, Transparency in Coverage (CMS-9915), 0938-AU04
- 185. HHS/CMS, FY 2021 Inpatient Rehabilitation Facility (IRF) Prospective Payment System Rate Update (CMS-1729), 0938-AU05
- 186. HHS/CMS, CY 2021 Home Health Prospective Payment System Rate Update and Quality Reporting Requirements (CMS-1730), 0938-AU06
- 187. HHS/CMS, FY 2021 Inpatient Psychiatric Facilities Prospective Payment System Rate Updates (CMS-1731), 0938-AU07

- 188. HHS/CMS, CY 2021 Changes to the End-Stage Renal Disease (ESRD) Prospective Payment System and Quality Incentive Program (CMS-1732), 0938-AU08
- 189. HHS/CMS, FY 2021 Hospice Wage Index, Payment Rate Update (CMS-1733), 0938-AU09
- 190. HHS/CMS, Hospital Inpatient Prospective Payment Systems for Acute Care Hospitals; the Long-Term Care Hospital Prospective Payment System; and FY 2021 Rates (CMS-1735), 0938-AU11
- 191. HHS/CMS, FY 2021 Skilled Nursing Facility (SNFs) Prospective Payment System Rate and Value-Based Purchasing Program Updates (CMS-1737), 0938-AU13
- 192. HHS/CMS, Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency (CMS-1744-IFC), 0938-AU31
- 193. HHS/CMS, Clinical Laboratory Improvement Amendments and Patient Protection and Affordable Care Act; Additional Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency (CMS-3401), 0938-AU33
- 194. HHS/CMS, Additional Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency (CMS-9912), 0938-AU35
- 195. HHS/OCR, Nondiscrimination in Health and Health Education Programs or Activities, 0945-AA11
- 196. HHS/ONC, 21st Century Cures Act: Interoperability, Information Blocking, and the ONC Health IT Certification Program, 0955-AA01
- 197. HHS/ACF, Head Start Designation Renewal System, 0970-AC77
- 198. HHS/OS, COVID-19 Hoarding Prevention under the Defense Production Act, 0991-AC23

### DEPARTMENT OF HOMELAND SECURITY

- 199. DHS/OS, Collection of Alien Biometric Data Upon Exit from the United States at Air and Sea Ports of Departure, 1601-AA34
- 200. DHS/USCIS, Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications, 1615-AC19
- 201. DHS/USCIS, Asylum Application, Interview, and Employment Authorization for Applicants, 1615-AC27
- 202. DHS/FEMA, COVID-19 Hoarding Prevention under the Defense Production Act, 1660-AB05

### DEPARTMENT OF THE INTERIOR

- 203. DOI/FWS, Endangered and Threatened Wildlife and Plants; Removal of the Gray Wolf from the List of Endangered and Threatened Wildlife, 1018-BD60



204. DOI/FWS, Migratory Bird Hunting; 2020-2021 Migratory Game Bird Hunting Regulations, 1018-BD89

## **DEPARTMENT OF JUSTICE**

205. DOJ/DEA, Registration and Reregistration Fees for Controlled Substance and List I Chemical Registrants, 1117-AB51

## **DEPARTMENT OF LABOR**

206. DOL/EBSA, *Transparency in Coverage*, 1210-AB93

207. DOL/WHD, *Fluctuating Workweek Under the Fair Labor Standards Act*, 1235-AA31

## **DEPARTMENT OF TRANSPORTATION**

208. DOT/NHTSA, *The Safer Affordable Fuel-Efficient Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks*, 2127-AL76

209. DOT/FRA, High-Speed Intercity Passenger Rail Program; Buy America Program Requirements, 2130-AC23

## **DEPARTMENT OF THE TREASURY**

210. TREAS/DO, Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States, 1505-AC63

211. TREAS/DO, Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 1505-AC64

212. TREAS/FINCEN, *Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Investment Advisers*, 1506-AB10

213. TREAS/IRS, Section 250 Regulations, 1545-BO55

214. TREAS/IRS, *Capital Gains Invested in Opportunity Zones*, 1545-BP03

215. TREAS/IRS, *Qualified Opportunity Funds*, 1545-BP04

216. TREAS/IRS, *Guidance Under Section 199A*, 1545-BP12

217. TREAS/IRS, *Guidance Regarding the Global Intangible Low-Taxed Income High Tax Exclusion*, 1545-BP15

218. TREAS/OCC, Community Reinvestment Act Regulations, 1557-AE34

219. TREAS/OCC, Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 1557-AE67

220. TREAS/OCC, Margin and Capital Requirements for Covered Swap Entities, 1557-AE69

221. TREAS/OCC, Capital Rule and Total Loss-Absorbing Capacity Rule: Eligible Retained Income Final Rule, 1557-AE81

222. TREAS/OCC, Regulatory Capital Rule: Revised Transition of the Current Expected Credit Losses Methodology for Allowances, 1557-AE82

223. TREAS/OCC, Regulatory Capital Rule: Temporary Exclusion of U.S. Treasury Securities and Deposits at Federal Reserve Banks from the Supplementary Leverage Ratio, 1557-AE85

224. TREAS/OCC, Regulatory Capital Rule: Payment Protection Program Lending Facility and Payment Protection Program Loans, 1557-AE90

## **DEPARTMENT OF VETERANS AFFAIRS**

225. VA, *Program of Comprehensive Assistance for Family Caregivers Amendments Under the VA MISSION Act of 2018*, 2900-AQ48

## **ENVIRONMENTAL PROTECTION AGENCY**

226. EPA/OW, *Steam Electric Reconsideration*, 2040-AF77

227. EPA/OAR, *Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act*, 2060-AM75

228. EPA/OAR, *Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration*, 2060-AT54

## **COUNCIL ON ENVIRONMENTAL QUALITY**

229. CEQ, *Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act*, 0331-AA03

## **FEDERAL ACQUISITION REGULATION**

230. FAR, *Federal Acquisition Regulation; FAR Case 2018-004; Increased Micro-Purchase and Simplified Acquisition Thresholds*, 9000-AN65

## **NUCLEAR REGULATORY COMMISSION**

231. NRC, *Revision of Fee Schedules: Fee Recovery for FY 2020* [NRC-2017-0228], 3150-AK10

**Long-Term Actions, 30 actions, two  
Deregulatory, 13 Regulatory**

**DEPARTMENT OF ENERGY**

232. DOE/EE, *Fossil Fuel-Generated Energy Consumption Reduction for New Federal Buildings and Major Renovations of Federal Buildings*, 1904-AB96

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

233. HHS/CMS, **Requirements for Long-Term Care Facilities: Regulatory Provisions to Promote Increased Safety (CMS-3347), 0938-AT36**
234. HHS/CMS, *Proficiency Testing Regulations Related to Analytes and Acceptable Performance (CMS-3355)*, 0938-AT55
235. HHS/CMS, *Policy and Technical Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs for Contract Year 2020; Risk Adjustment Data Validation (CMS-4185)*, 0938-AT59
236. HHS/CMS, *Comprehensive Care for Joint Replacement Model Three-Year Extension and Modifications to Episode Definition and Pricing (CMS-5529)*, 0938-AU01
237. HHS/CMS, *Treatment of Medicare Part C Days in the Calculation of a Hospital's Medicare Disproportionate Patient Percentage (CMS-1739)*, 0938-AU24

**DEPARTMENT OF HOMELAND SECURITY**

238. DHS/USCIS, *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, 1615-AC06
239. DHS/USCIS, *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements*, 1615-AC18
240. DHS/USCIS, **Electronic Processing of USCIS Immigration Benefit Requests, 1615-AC20**
241. DHS/USCBP, *Importer Security Filing and Additional Carrier Requirements*, 1651-AA70
242. DHS/FEMA, *Prioritization and Allocation of Certain Scarce or Threatened Health and Medical Resources for Domestic Use*, 1660-AB01

**DEPARTMENT OF LABOR**

243. DOL/ETA, *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, 1205-AB76
244. DOL/EBSA, *Improved Fee Disclosure for Welfare Plans*, 1210-AB37
245. DOL/OSHA, *Infectious Diseases*, 1218-AC46

246. DOL/OSHA, *Process Safety Management and Prevention of Major Chemical Accidents*, 1218-AC82

**DEPARTMENT OF TRANSPORTATION**

247. DOT/FMCSA, *Heavy Vehicle Speed Limiters*, 2126-AB63
248. DOT/NHTSA, *Heavy Vehicle Speed Limiters*, 2127-AK92
249. DOT/NHTSA, *Federal Motor Vehicle Safety Standard (FMVSS) 150—Vehicle to Vehicle (V2V) Communication*, 2127-AL55

**DEPARTMENT OF THE TREASURY**

250. TREAS/FINCEN, *Financial Crimes Enforcement Network: Cross-Border Electronic Transmittals of Funds*, 1506-AB01
251. TREAS/OCC, *Collective Investment Funds: Prior Notice Period for Withdrawals*, 1557-AE99
252. TREAS/CDFIF, *Interim Rule for the CDFI Bond Guarantee Program*, 1559-AA01

**DEPARTMENT OF VETERANS AFFAIRS**

253. VA, *Post-9/11 Improvements, Fry Scholarship, and Interval Payments Amendments*, 2900-AQ88
254. VA, *Reimbursement for Emergency Treatment*, 2900-AQ08

**ENVIRONMENTAL PROTECTION AGENCY**

255. EPA/OCSPB, *Trichloroethylene; Rulemaking Under TSCA Section 6(a); Vapor Degreasing*, 2070-AK11

**FEDERAL COMMUNICATIONS COMMISSION**

256. FCC, *Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions (GN Docket No. 12-268)*, 3060-AJ82
257. FCC, *Processing Applications in the Direct Broadcast Satellite (DBS) Service; Feasibility of Reduced Orbital Spacing for Provision of DBS Service in the United States (IB Docket No. 06-160)*, 3060-AI86
258. FCC, *Restoring Internet Freedom (WC Docket No. 17-108); Protecting and Promoting the Open Internet (GN Docket No. 14-28)*, 3060-AK21
259. FCC, *Call Authentication Trust Anchor*, 3060-AL00
260. FCC, *Implementation of the National Suicide Improvement Act of 2018*, 3060-AL01

**NUCLEAR REGULATORY COMMISSION**

261. NRC, *Revision of Fee Schedules: Fee Recovery for FY 2022 [NRC-2020-0031]*, 3150-AK44

# Part H. Rules Affecting Small Business, 1998–2019

	2019	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998
Dept. of Agriculture	30	24	31	46	40	47	45	80	65	84	87	93	73	67	54	52	64	39	56	47	49	63
Dept. of Commerce	85	90	90	94	109	112	103	158	115	98	90	107	112	111	108	79	74	77	89	98	88	52
Dept. of Defense	4		1	1	10	7	12	25	26	16	12	7	13	14	13	12	13	6	8	7	15	21
Dept. of Education	2	2	2		1	2	3		1	1	0	0	0	1	0	0	0	1	0	0	0	0
Dept. of Energy	14	12	15	14	8	4	5	8	6	3	2	1	1	0	0	0	1	0	1	1	0	0
Dept. of Health and Human Services	60	64	67	73	93	103	91	85	100	112	94	93	96	109	112	106	96	92	108	107	75	88
Dept. of Homeland Security	27	28	27	25	22	25	28	27	34	37	35	42	44	43	43	38	33	0	0	0	0	0
Dept. of Housing and Urban Development	1	1	2	2	1				0	1	0	1	5	4	4	6	11	6	3	0	1	1
Dept. of the Interior	18	13	9	30	35	30	23	24	23	18	17	18	19	29	21	20	26	17	20	18	33	29
Dept. of Justice	4	5	5	12	9	10	10	9	9	5	3	2	5	7	8	8	8	13	15	14	14	10
Dept. of Labor	31	26	12	20	22	24	22	24	23	26	29	29	26	26	19	19	23	22	26	40	38	41
Dept. of State	31	31	25	14	18	21	20	31	21	20	4	3	1	0	1	1	2	6	3	2	0	0
Dept. of Transportation	39	46	47	56	61	53	68	65	56	49	45	41	43	60	63	103	151	216	244	266	246	208
Dept. of the Treasury	36	34	36	41	23	27	29	39	47	56	48	47	45	37	41	38	27	26	27	31	15	60
Dept. of Veterans Affairs	2		1	1	1	1	2	1	2	3	2	2	0	0	0	0	0	1	1	3	6	6
Agency for International Development									1	1	0	0	1	1	0	0	1	2	1	0	0	0
Arch. and Trans. Barriers Compliance Board			1	2	2	1	1	1	1		0	0	0	0	0	0	0	1	1	2	2	3
Commodity Futures Trading Commission	1	2	2	2		1			0		1	1	1	0	1	1	2	0	0	0	0	1
Consumer Financial Protection Bureau	12	10	8	3	4	3	4	8	5													
Consumer Product Safety Commission	5	8	5	4	2			2	0			0	0	1	0	0	0	0	0	0	0	0
Corporation for National and Community Service									0		0	0	0	1	1	0	0	0	0	0	0	0
Environmental Protection Agency	6	3	4	14	12	6	6	49	73	95	89	83	85	95	110	122	135	167	185	205	179	178
Equal Employment Opportunity Commission	5	3	3	2	2	2	2	3	5	5	4	2	3	3	3	0	0	0	2	0	0	2
Federal Emergency Management Agency													0	0	0	0	0	1	1	1	0	0
Federal Acquisition Regulation	60	53	43	38	22	24	17	15	10	5	4	6	5	5	7	5	5	6	9	13	16	11

	2019	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998
Federal Communications Commission	69	61	77	92	99	98	99	89	78	112	110	110	109	108	113	113	104	109	117	105	91	82
Federal Deposit Insurance Corporation	4						4	5	2	1												
Federal Energy Regulatory Commission									0			0	1	0	0	0	0	0	0	0	1	0
Federal Housing Finance Board									0			0	0	0	0	0	0	0	0	0	0	1
Federal Maritime Commission				3	1	1	1	1	3	3	3	3	2	3	5	7	10	7	6	7	4	5
Federal Reserve System	3	4	2	2	4	7	5	12	17	8	6	5	5	3	6	5	3	7	10	8	2	5
Federal Trade Commission	16	14	18	16	18	21	18	21	22	16	16	13	11	13	12	11	9	9	9	9	10	10
Federal Mediation and Conciliation Service									0			0	0	0	0	0	0	0	1	1	0	0
General Services Administration	24	28	15	13	10	4	2	3	4	5	6	7	3	3	3	1	5	4	1	1	2	2
National Aeronautics and Space Administration					1	1	2	2	3			0	0	0	0	0	0	0	0	0	0	1
National Archives and Records Administration									0			0	0	0	1	1	1	0	0	0	0	1
National Credit Union Administration								2	4	4	7	3	1	4	1	2	0	0	0	0	0	0
National Endowment for the Arts	2	2	2	2	2	2	2	2				0	0	0	0	0	2	2	0	0	0	0
National Endowment for the Humanities									0			0	0	0	0	0	0	0	0	0	0	0
National Labor Relations Board	2	1																				
Nuclear Regulatory Commission	3	3	3	3	3	4	3	6	3	1	2	1	2	1	1	0	3	5	5	3	5	8
Office of Management and Budget	2	1							0			0	0	0	0	0	0	0	0	1	2	1
Pension Benefit Guaranty Corporation				1																		
Railroad Retirement Board									0			0	0	0	0	0	0	0	0	0	0	0
Resolution Trust Corporation														0	17	0	0	0	0	0	0	0
Small Business Administration	11	15	17	19	28	23	27	38	35	39	20	13	15	21	19	18	24	21	21	24	28	20

## Part H. Rules Affecting Small Business, 1998–2019 (continued)

	2019	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998
Social Security Administration									1		1	1	1	1	1	1	1	1	0	0	2	0
Surface Transportation Board	1	1	1	2		1																
Securities and Exchange Commission	34	20	19	24	11	9	15	19	27	21	21	19	29	16	0	20	25	28	26	40	39	27
<b>TOTAL</b>	<b>644</b>	<b>605</b>	<b>590</b>	<b>671</b>	<b>674</b>	<b>674</b>	<b>669</b>	<b>854</b>	<b>822</b>	<b>845</b>	<b>758</b>	<b>753</b>	<b>757</b>	<b>787</b>	<b>788</b>	<b>789</b>	<b>859</b>	<b>892</b>	<b>996</b>	<b>1054</b>	<b>963</b>	<b>937</b>

Source: Compiled from "The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions," Federal Register, various years' editions, [www.reginfo.gov](http://www.reginfo.gov).

## Part I. The Unconstitutionality Index, 1993–2020

Year	Final Rules	Public Laws	The Index	Notices	Executive Orders	Executive Memos
1993	4,369	210	21			
1994	4,867	255	19			
1995	4,713	88	54	23,105	40	
1996	4,937	246	20	24,361	50	
1997	4,584	153	30	26,035	38	
1998	4,899	241	20	26,198	38	
1999	4,684	170	28	25,505	35	
2000	4,313	410	11	25,470	39	13
2001	4,132	108	38	24,829	67	12
2002	4,167	269	15	25,743	32	10
2003	4,148	198	21	25,419	41	14
2004	4,101	299	14	25,309	46	21
2005	3,975	161	25	25,353	27	23
2006	3,718	321	12	25,031	25	18
2007	3,595	188	19	24,476	32	16
2008	3,830	285	13	25,279	29	15
2009	3,503	125	28	24,753	44	38
2010	3,573	217	16	26,173	41	42
2011	3,807	81	47	26,161	33	19
2012	3,708	127	29	24,408	39	32
2013	3,659	72	51	24,261	24	32
2014	3,554	224	16	23,970	34	25
2015	3,410	114	30	24,393	29	31
2016	3,853	214	18	24,557	45	36
2017	3,281	97	34	22,137	63	38
2018	3,368	313	11	22,025	35	30
2019	2,964	105	28	21,804	47	26
<b>2020</b>	<b>3,353</b>	<b>178</b>	<b>19</b>	<b>22,480</b>	<b>69</b>	<b>59</b>

Sources: Final rules, notices, and executive orders compiled from database at National Archives and Records Administration, Office of the Federal Register, <https://www.federalregister.gov/articles/search#advanced>; Public laws from Government Printing Office, Public and Private Laws, <http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=PLAVV>.

## Notes

1. Niv Elis, "Conservatives Left Frustrated as Congress Passes Big Spending Bills," *The Hill*, September 19, 2018, <https://thehill.com/homenews/house/407320-conservatives-left-frustrated-as-congress-passes-big-spending-bills>.
2. Ben Holland and Jeanna Smialek, "Skyrocketing Deficit? So What, Says New Washington Consensus," *Bloomberg*, October 1, 2018, <https://www.bloomberg.com/news/articles/2018-09-30/skyrocketing-deficit-so-what-says-new-washington-consensus>. Victoria Guida, "Ocasio-Cortez Boosts Progressive Theory That Deficits Aren't So Scary," *Politico*, February 6, 2019, <https://www.politico.com/story/2019/02/06/alexandria-ocasio-cortez-budget-1143084>. Jeff Cox, "Powell Says Economic Theory of Unlimited Borrowing Supported by Ocasio-Cortez Is Just 'Wrong,'" *CNBC*, February 26, 2019, <https://www.cnbc.com/2019/02/26/fed-chief-says-economic-theory-of-unlimited-borrowing-supported-by-ocasio-cortez-is-just-wrong.html>.
3. Nelson D. Schwartz, "As Debt Rises, the Government Will Soon Spend More on Interest than on the Military," *CNBC*, February 26, 2019, <https://www.cnbc.com/2018/09/26/as-debt-rises-the-government-will-soon-spend-more-on-interest-than-on-the-military.html>.
4. Congressional Budget Office, *The Budget and Economic Outlook: 2021 to 2031*, Table 1-1, "CBO's Baseline Budget Projections, by Category," February 2021, p. 2, <https://www.cbo.gov/system/files/2021-02/56970-Outlook.pdf>.
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even used to edit *Ten Thousand Commandments*. We lost James in 2020, and miss our work with him that continued throughout his career at the Heritage Foundation. CEI President Kent Lassman penned this tribute to James in July 2020, “A Fond Farewell to a Dear Friend,” *OpenMarket*, Competitive Enterprise Institute, July 30, 2020, <https://cei.org/blog/a-fond-farewell-to-a-dear-friend/>.

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IV. Notice and Public Comment for Economically Significant Guidance Documents:

1. In General: Except as provided in Section IV(2), when an agency prepares a draft of an economically significant guidance document, the agency shall:

a. Publish a notice in the Federal Register announcing that the draft document is available;

Rob Portman, administrator, Office of Management and Budget, “Issuance of OMB’s “Final Bulletin for Agency Good Guidance Practices,” Memorandum for the Heads of Executive Departments and Agencies, January 18, 2007, <https://georgewbush-whitehouse.archives.gov/omb/memoranda/fy2007/m07-07.pdf>. “Final Bulletin for Agency Good Guidance Practices,” *Federal Register*, Vol. 72, No. 16 (January 25, 2007), pp. 3432–3440, [http://www.justice.gov/sites/default/files/ust/legacy/2011/07/13/OMB\\_Bulletin.pdf](http://www.justice.gov/sites/default/files/ust/legacy/2011/07/13/OMB_Bulletin.pdf).

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[\\_status%5b%5d=9#sort=-current\\_status\\_date&current\\_status\[\]=28](https://www.govtrack.us/congress/bills/browse?status=28,29,32,33&sort=-current_status_date%20-%20current_status%5b%5d=9#sort=-current_status_date&current_status[]=28). Figures are presented by calendar year. For breakdown by session of Congress, see “Statistics and Historical Comparison, Bills by Final Status,” GovTrack, <https://www.govtrack.us/congress/bills/statistics>.

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## About the Author

Clyde Wayne Crews, Jr. is Vice President for Policy at the Competitive Enterprise Institute (CEI). He is widely published and a contributor to *Forbes*. 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, Crews 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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