

Needed: An agenda for rightsizing Washington

Rule counts regularly topped 4,000 in the 1990s. That is the wrong comparison for Biden's lower rule counts. His fewer rules have higher costs, are less transparent, have less congressional oversight, and coordinate multiple agencies on whole-of-government campaigns having little to do with their missions.

The near future will likely be even more active. There is a surge in active rules in the Unified Agenda, and the number of rules meeting the doubled \$200 million Section 3(f)(1) (S3F1) threshold is roughly on par with the \$100 million rules from 2022. Further upticks in rules affecting small business and lower-level governments are likely, while guidance document proliferation remains a concern.

We close with an appeal to restore enumerated powers, action items to set Congress back above a de minimis administrative state, and a Regulatory Report Card template. Such reporting transparency and disclosure are a necessary if not

sufficient requirement, much like the role the federal budget itself plays.

Overdelegation is rampant but a secondary concern compared with recent debt-fueled legislative transformations that flout Congress's own enumerated powers. The CARES Act, Families First Coronavirus Act, American Rescue Plan, Infrastructure Investment and Jobs Act, Inflation Reduction Act, CHIPS and Science Act, and even lesser-known new laws like the Airport and Airway Extension Act reaffirm the top-down stance toward major productive sectors. As the inventories of Box 1 (completed high-significance actions of 2023) and Appendix J (active and long-term actions in the pipeline) are already revealing, much of tomorrow's rulemaking and guidance will be rooted in the actions of the 117th and 118th Congresses. So a streamlining job awaits the 119th.

Congress should make it hard to both spend and regulate. And it should do this with the zeal it once showed about requirements for a two-thirds

majority vote for revenue increases.¹¹⁸ Had that effort succeeded, Washington may have been rightsized by now.

In today's setting, rightsizing will require Congress to repeal or amend statutes that sustain the massive regulatory enterprise and abolish, downsize, slash the budgets of, and deny appropriations to agencies, subagencies, and programs. Much of the antitrust regulatory apparatus should be repealed,¹¹⁹ for example, along with the Federal Trade Commission's and Federal Communications Commission's acts in their current form. Abuses of crises and national emergency declarations require sweeping privatization and localization of federal functions and ending grants and subsidies of all kinds that fuel regulation.¹²⁰ Such steps are necessary to abolish the custodial state's whole-of-government forays into climate, equity, competition policy, censorship, and social engineering now undermining the nation's stability, productivity, and fairness.

The 2023 edition of this report surveyed the 118th Congress's primary regulatory reform bills,¹²¹ so here we recap some of the underlying concepts and newer options, which can be carried out—to a lesser extent if Congress fails to act—by an administration committed to administrative streamlining that goes well beyond one-in, two-out.

Foremost, Congress should enforce the regulatory controls now ignored, such as the absence of a timely annual *Information Collection Budget*, the cost-benefit *Report to Congress*, and the accompanying aggregate cost assessment required by the 1999 Regulatory Right-to-Know Act. Congress needs to verify and document that rules and guidance are submitted to both houses of Congress and to the Government Accountability Office (GAO) as required by the Congressional Review Act, and to affirm a stance that rules and guidance not reported are void.

Federal agencies cannot reliably perform cost-benefit analysis, for the same reason that students should not grade their own tests. Creative regulators, now with Office of Management and Budget (OMB) support, can alternate between maximizing suspect net benefits as the new Circular A-4 allows, or they can simply claim that benefits justify costs, as specified in Executive Order 12866. Congress must stop the Circular A-4 regime's fueling of indefinite regulatory expansion and redefine oversight guardrails in such a way that the executive branch cannot erode them again.

If OMB is compromised in such a way that it can no longer perform its supervisory function, it needs to be reformed or replaced.¹²² Alternatively, a tough and skeptical Congressional Office of Regulatory Analysis should be established.¹²³ One was instituted at the turn of the century but was subsequently defunded.

Congress should take direct responsibility and approve all costly or controversial regulations before they are binding. Along with reaffirming constitutional norms, that approach forces Congress to internalize costs of nonquantifiable interventions like those outlined in Appendix C. The current incarnation of this principle is the REINS Act (Regulations from the Executive in Need of Scrutiny Act). The forerunner is the better-named Congressional Responsibility Act, which would “prohibit a regulation from taking effect before the enactment of a bill comprised solely of the text of the regulation.”¹²⁴ A related step toward democratic accountability is requiring a Senate-confirmed official to sign off on new rules.

Routine review and rule purging could be enabled by a Regulatory Reduction Commission modeled after the military Base Realignment and Closure Commission to assemble regular reports on outdated, unnecessary, and duplicative rules that

Congress would eliminate by joint resolution.¹²⁵ In a related development that might open the door to some cross-fertilization, the House Budget Committee is now mulling a bipartisan Fiscal Commission Act to address the national debt.¹²⁶ With containments like the foregoing in place, a limited regulatory budget could help assess, disclose, and cap costs of regulations and guidance documents individually and in the aggregate.

Congress must address guidance document abuse, starting with requiring that guidance documents uniformly attest to their nonbinding nature.¹²⁷ No *Code of Federal Regulations*-style database exists for guidance, and even the nascent portals Trump established by executive order were cast aside by the current administration (see Table 5).

Congress needs to formalize guidance document disclosure. The Guidance Out of Darkness (GOOD) Act to establish public portals where agencies post their guidance documents is the primary vehicle here, and it has strong bipartisan support—passing the House Committee on Oversight and Accountability with a 41–0 vote in summer 2023. Further steps beyond the GOOD Act are needed, such as requiring a single portal rather than individual agency portals and implementing a “GIN” or Guidance Information Number classification system mirroring the Regulation Identifier Number for rules.¹²⁸ Guidance has risen in significance and should be coordinated and cross-referenceable with *Federal Register* and Unified Agenda rule reporting. As noted earlier, even numerical cataloging for rules and executive orders is relatively new, and guidance can catch up.

Online databases like Regulations.gov make it far easier than in the pre-internet era to learn about regulatory trends and acquire information on rules, but more can be done to reinforce the foregoing reforms. Vital information should be summarized for the public, researchers, and Congress in annual regulatory transparency report cards and historical tables, components of which might resemble Box 2. Possible venues include the federal budget, the Unified Agenda, and the *Economic Report of the President*; Regulations.gov; or as part of a resurrected Regulatory Program of the US Government.

Large-scale rules boast a bewildering terminology encompassing such species as significant, major, S3F1 Significant and until April 2023, economically significant, not counting guidance documents. A report card might inspire some consolidation and easier mapping between the Unified Agenda, the GAO, and the *Federal Register*. In addition to revealing burdens, impacts, and trends, a report card can help reveal what policymakers do not know or appreciate about the regulatory state, such as making more obvious the high percentage of rules for which cost or benefit quantifications do not exist.

Congress needs to take regulatory policy at least as seriously as it takes fiscal policy. It needs to emphasize regulatory oversight and transparency, and clamp down on guidance document abuse and other regulatory dark matter that dodges protections against rogue executive rulemaking. Congress needs to limit not only executive power, but its own power as well. It has increasingly ignored those limits, but it does not have to be that way.

Box 2. Regulatory transparency report card: Suggested official summary data by program, agency, and grand total

- Tallies of high-significance rules and minor rules by department, agency, and commission, by cost tier (an ALERT Act component)

Breakdown of High-Significance Rules

Category 1	> \$50 million, < \$500 million
Category 2	> \$500 million, < \$1 billion
Category 3	> \$1 billion
Category 4	> \$5 billion
Category 5	>\$10 billion

- Tallies of regulatory and guidance cost estimates, including subtotals by agency and grand total by category. These could include paperwork hours, economic costs, and social, health and safety, environmental costs
- Aggregate cost estimates of regulation and guidance
- Numbers and percentages of regulations that contain these numerical cost estimates
- Numbers and percentages of rules lacking cost estimates, with explanations
- Number and percentage of interim final rule enactments and reviews
- Tallies of significant and other guidance documents, memoranda, and other regulatory dark matter by department, agency, and commission
- Rankings of most active rule-making agencies
- Identification of which agencies most increased rule output in absolute and percentage terms
- Numbers and percentages of executive and independent agency rules deemed deregulatory
- Numbers and percentages of rules affecting small business by significance, with RFA-required and non-required; deregulatory component
- Depictions of how regulations and guidance accumulate as small businesses grow
- Traditional *Federal Register* analysis, including number of pages and proposed and final rule breakdowns by agency, and reconciliations with other reporting vehicles, such as numbers of rules new to the Unified Agenda; numbers that carry over from previous years
- Number of major rules reported on by the GAO in its database of reports on regulations
- Number and percentage of agency rules and guidance documents presented properly to Congress in accordance with the Congressional Review Act
- Assessment of rules that purportedly affect internal agency procedures alone
- 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
- Percentages of rules and guidance documents reviewed, and not reviewed, by the OMB, and any actions taken