

## REGULATORY REFORM

# Trump's Regulatory Legacy: A First Draft

*Despite the headlines, the Trump administration will likely have little lasting effect on federal regulation.*

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When then-candidate Donald Trump began campaigning for president in 2015, he promised major cuts in regulation. He even quantified what he meant by this: in 2016 he remarked: “We are cutting the regulation at a tremendous clip. I would say 70% of regulations can go.”

As his presidency comes to a close, it is worth reflecting on both that remark and his regulatory legacy over the past four years. On net, it has been somewhat unprecedented in its paucity of new major rules and its attempt to fundamentally reform the regulatory process through a “one-in, two-out” regulatory budget. Although conservatives have talked about regulatory budgets—including often in these pages—the Trump administration actually implemented one, and without going to Congress. For fans of fundamental reform, that is a major achievement. But its continuance is in doubt as another political party takes power.

On that point, it is worth emphasizing that without Congress, the durability of any regulatory legacy—even an unprecedented one—is dependent on the will of subsequent presidents who can undo that legacy with the stroke of a pen. When Joe Biden arrives in the Oval Office, he will be able to swiftly repeal Trump’s one-in, two-out Executive Order 13771. Over the next four years, Biden can undo much of the deregulatory actions of the Trump administration. Some vestiges of Trump’s regulatory legacy will remain, but it is the 115th Congress’s unheralded S. 2155, which reformed parts of the 2010 Dodd-Frank financial regulation legislation, and guidance adding more scrutiny over independent agencies

that might be his biggest enduring regulatory achievements.

## TRUMP’S RECORD BY THE NUMBERS

There arguably are two ways to measure regulation: the stock and the flow. The former references existing regulations on the books. To then-candidate Trump’s 70% promise, cutting the stock of all federal rules (a figure that is quantifiable but unknowable in practice) by that percentage is largely an impossible task—whether in four years or eight. However, cutting the flow of major regulations—those with an annual economic effect of \$100 million or greater—is indeed achievable and a task many progressives labeled “radical.”

For some context, from his inauguration until October 1, 2016, President Barack Obama and his agencies issued 635 major regulations. During his first term, the Obama administration promulgated 326 major rules. A 70% cut in the flow of regulations would yield just 98 major rules over a four-year period. According to the Government Accountability Office’s (GAO) major rules database, President Trump and his regulators had issued 238 major rules through October 1. Doing the math, President Trump has already issued at least 73% of the major rule flow of the Obama administration’s first term in Trump’s one (not yet complete) term.

The GAO figures above are somewhat blunt instruments to measure regulatory output, despite what many might read in the press. The Trump major rules do include *deregulatory* actions, as both regulation and deregulation require the issuance of new rules. For example, the Environmental Protection Agency issued just seven major rules from January 21, 2017 to October 1, 2020. One of those rules was the “Repeal of the Clean Power Plan,” a vestige of the Obama administration aimed at curbing greenhouse gases. By contrast, the Obama EPA issued 21 major rules during the same period in his first term. On this count, President Trump



has succeeded in cutting the flow of major EPA regulations by 70%. Progressives and environmentalists would likely agree the EPA cutbacks have been significant.

A different way to measure Trump's regulatory legacy is to determine the increase or decrease in regulatory costs and benefits under his presidency. According to regulatory data from the American Action Forum, which tracks every regulation published, on net the Trump administration has increased regulatory costs by a mere \$638 million. Given that some estimates of the annual cost of federal regulation approach and exceed \$1 trillion, that increase is essentially a rounding error and a testament to the effectiveness of Executive Order 13771 in stanching the flow of burdensome regulations. But it is also a reflection of how difficult it is to *reduce* regulatory burdens in D.C.

On an annualized basis, which is how the government measures major rule status, there have been only 17 rules that have reduced costs by at least \$100 million annually. On the other side of the

spectrum, the Trump administration has issued 27 rules that have raised annualized costs by at least \$100 million. The largest among them is a Defense Federal Acquisition Regulation Supplement for cybersecurity that increased costs by \$6.5 billion—a rule that generated few headlines. By contrast, the most deregulatory rule on the books is courtesy of the Department of Health and Human Services, which cut annual compliance costs by just \$647 million.

If that last number seems underwhelming, it's because it is. That is, at least in part, a testament to how difficult it is to reduce regulatory costs under our current system. Career staff, the regulatory review process at the Office of Information and Regulatory Affairs (OIRA), congressional scrutiny, the press, and the courts all play important roles in either reducing or increasing regulation.

Again, consider the EPA, which many Trump supporters point to as demonstrating the administration's regulatory effectiveness. According to American Action Forum data, the EPA has managed to reduce regulatory costs by a total of \$205 billion going forward

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(on a net present value basis), though the annualized figure is negligible. This \$205 billion is incredibly misleading, however, because it is driven almost entirely by the EPA's repeal of fuel efficiency standards for 2021–2026 cars and light trucks. Somehow, the agency estimated a total of nearly \$200 billion in present-value cost savings but just \$14.4 million in annualized reductions. That ratio strains credulity and future scholars would do well to determine if it is the most extreme ratio in modern regulatory history.

**Paperwork** / And then there is the matter of paperwork. Any regulatory agenda that aims for a 70% cut—whether in the stock or flow of regulations—would result in a significant reduction in the paperwork burden that government places on Americans. Although this burden is driven largely by the countless hours that businesses and individuals spend filing and complying with federal taxes, if there were monumental shifts in regulatory burdens, one would expect at least modest reductions in the paperwork burden required for compliance with those regulations.

However, according to American Action Forum figures, Trump's regulations *added* 292 million hours of paperwork. Such estimates occasionally miss federal notices that make dramatic changes to paperwork behind the scenes, so perhaps Trump's paperwork legacy is much better than this suggests. A different measure would be OIRA's estimate of the cumulative daily paperwork burden for the entire government. Soon after President Trump took the oath of office, OIRA estimates there were roughly 11.67 billion paperwork burden hours. By October 2020 that estimate was 11.61 billion paperwork hours. In other words, there has been no significant reduction in paperwork during Trump's presidency—barring some last-minute move by regulators.

In sum, Trump's promise to cut regulations by 70% turned into a 27% cut in the *flow* of major rules as compared to the Obama presidency, and a mere 5% reduction in cumulative paperwork.

### COURTS AND DEREGULATION

As every president can attest, the courts can have an outsized effect on an administration's regulatory legacy. President Obama lost several major rules to the judicial process during his two terms. By some metrics, President Trump has fared even worse in the courts.

The Institute for Policy Integrity, part of New York University's School of Law, keeps track of Trump-era policies in the courts. They employ a somewhat crude, binary metric of “successful” and “unsuccessful” actions. The regulatory process and judicial review are more nuanced, of course, but this is one way to determine how well regulators and the administration followed existing statutes and the regulatory process.

According to the Institute for Policy Integrity's data, the

administration was unsuccessful on 119 actions, meaning Trump either lost in the courts or withdrew the measure after a lawsuit. By contrast, the administration was successful just 22 times. This makes for an abysmal 15% success rate. If a presidency is trying to deregulate and courts strike down or the administration backs down 5.4 times for every successful deregulatory move, deregulation will plod along slowly.

Consider energy and natural resources regulations. The administration has just a 17% success rate. Trump lost rules pertaining to migratory birds, ozone regulations, National Ambient Air Quality Standards, the Toxic Substances Control Act, and tighter pollution limits on coal-fired power plants, among many others. Even among Republican judges, the administration's success rate was just 42%; this is better than the overall total but still “failing” on the academic scale.

The Institute for Policy Integrity breaks out legal actions

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concerning “deregulation” specifically. Trump's record on these is poor, too. Of the 14 deregulatory actions in the database, the administration succeeded only three times. First, they won on a postponement of compliance dates for restrictions on toxic-metal wastewater discharges. Second, the courts upheld the EPA's decision not to finalize a proposed Obama-era rule regulating hard-rock mine operators. Third, courts allowed the Department of Agriculture to withdraw an interim final rule and proposed regulations regarding the marketing of livestock, meat, and poultry. These are hardly landmark deregulatory victories that will stand the test of time.

On the other side of deregulatory losses in the courts, the EPA lost two rulings on revisions to an Obama-era Clean Water Rule, once because the agency failed to seek public comment and again on the delay of the regulation. Courts also found that the administration did not have statutory authority to suspend fuel economy standards for cars and light trucks. Finally, a federal court stayed a rule limiting formaldehyde emissions from composite wood products.

It is difficult to envision a successful deregulatory campaign if the administration is losing roughly 85% of its controversial rules to judicial review and 83% of its notable deregulatory measures. One must analyze any regulatory legacy in terms of its durability after a president leaves office. If the Clean Power Plan were immediately



struck down by the courts, its effect would obviously be muted. Likewise, issuing “deregulatory” rules means nothing unless they have some discernable effect on businesses and the economy. If Trump’s regulatory policies do not have much effect beyond the first few years he is out of office, either because they are overturned by the courts or thrown out by the Biden administration, then the Trump presidency will have issued a lot of documents and press releases but had a negligible effect on regulatory costs, which was Trump’s stated goal from the outset. On-paper cost reductions are far different than in-practice cuts and the courts have played an important role in highlighting that distinction.

### WHAT LEGACY?

Of course, we will not know the full Trump regulatory legacy for several years. As of now, though, one can argue that the two most significant, enduring achievements might be S. 2155 and the administration’s extending benefit–cost scrutiny to major regulations issued by independent agencies.

**S. 2155** / Although largely overlooked, S. 2155 was a bipartisan attempt to curtail regulatory burdens on small financial institutions. Formally known as the “Economic Growth, Regulatory Relief, and Consumer Protection Act,” introduced by Senate Banking Committee chair Mike Crapo (R-ID), the legislation reformed parts of Dodd–Frank, but was hardly the wholesale change some Republicans and libertarians wanted. On the other hand, its deregulatory impulses were too much for progressives like Sen. Elizabeth Warren (D-MA), who waged a vocal fight against the bill.

Broadly, S. 2155 accomplished four things:

- It modified the Volcker rule limiting what investment activities banks can engage in with their own money.
- It altered qualified mortgage criteria.
- It provided smaller banks with an “off ramp” from Basel III capital requirements.
- It provided regulatory relief for most banks with assets between \$10 billion and \$250 billion.

These are not small changes, but it is telling that they have gone largely unnoticed by the public and the media.

In Congress, the passage of S. 2155 was largely bipartisan, with 67 votes in the Senate, including 17 Democrats. In the House, it received 258 votes, including 33 Democrats. Although not unanimous, there were enough moderate and even progressive lawmakers supporting the measures that they are likely to stick around for at least the next four years. Although many expect tighter financial regulations under the Biden administration, they will likely focus on banks with more than \$250 billion in assets, not those with \$10 billion to \$20 billion. We might actually get more deregulation for smaller banks, as the political scrutiny now lies squarely on large banks and multinational companies.

One can easily make the case that if the reforms of S. 2155

remain standing over the next four to eight years, they will have been Trump’s most notable regulatory legacy. Although his one-in, two-out regulatory budget made headlines and history, everyone can rest assured it will not last long into the Biden administration.

**Independent agency review** / A little-known April 2019 Office of Management and Budget Memo from acting director Russell Vought to all federal agencies has had little practical effect during the past two years, but it could be embraced by future presidents. Formally known as OMB Memo M-19-14, the action used the existing authority of the Congressional Review Act (CRA) to ensure greater regulatory scrutiny on independent agencies.

Traditionally, only executive agencies are subject to the benefit–cost analysis requirements of President Bill Clinton’s Executive Order 12866. That means agencies like the Securities and Exchange Commission and the Federal Communications Commission largely avoid the benefit–cost scrutiny that agencies like the EPA must undergo. This bifurcation of the regulatory state has long seemed ridiculous, with some agencies having to calculate whether their new major regulations are net beneficial while other agencies do not. Though the memo does not give OIRA the power to effectively veto an independent agency action, it makes plenty of statutory sense under the CRA that OIRA determine whether a rule has an economic effect of \$100 million or greater.

This was Vought’s rationale when he asked all independent agencies to notify OIRA of upcoming rules and submit any measures to OIRA within 30 days of publication in the *Federal Register*. This enhanced, albeit limited, review of independent agency actions could easily persist into the next administration. First, the CRA explicitly allows OIRA alone to determine major rule status. How can the statute operate effectively if OIRA lacks the authority to review benefit–cost analyses before publication? No one should hold out hope that the Biden administration will formally bring independent agencies under OIRA review. However, do not be surprised if OIRA continues to exercise authority under the CRA to scrutinize major rule status.

### CONCLUSION

With a “midnight” period of regulation now underway, President Trump’s regulatory legacy is not yet complete. However, his tenure should fairly be judged in four to eight years on whether his actions will have lasting effect on the substance and process of regulation. On the process front, the one-in, two-out order will never last under a Democratic administration unless it is adopted by Congress with strong majorities—and that will not happen in the 117th Congress. Trump’s deregulatory attempts have faltered in the courts and will face headwinds when President Biden begins to rescind them.

However, the reforms of Dodd–Frank and the increased scrutiny of independent agencies might prove to be enduring actions. Virtually every other regulatory move will amount to background noise in what was a pretty loud Trump presidency. R