

BRIEFLY NOTED

Achieving Durable Success in the Fight for Deregulation

◆ BY SAM BATKINS AND IKE BRANNON

By virtually any metric, President Trump's regulatory agenda has achieved nearly unprecedented results. Neomi Rao, the administrator of the Office of Information and Regulatory Affairs (OIRA), has carried out Trump's one-in, two-out executive order (EO 13771) to the letter, just as his supporters had hoped and detractors had feared.

The data suggest that the Barack Obama administration marked a high point for the regulatory state. In Obama's last year in the Oval Office, regulators published 116 major rules. (The government formally defines a major rule as one with an economic impact exceeding \$100 million, which requires it be subjected to a formal cost-benefit analysis.) That is 16 more than the previous one-year record for major rules, which was also set by the Obama administration in 2010.

Rules issued under Obama imposed more than \$870 billion in net present value costs according to estimates from the agencies themselves (and compiled by the American Action Forum). These regulations required an estimated 580 million hours of paperwork for firms to comply with the new standards. The paperwork figure is the equivalent of 291,500 employees working full-time to comply with the new rules.

The Obama regulatory expansion was unprecedented, whether measured in cost, the number of major rules, or number of billion-dollar rules. It was against this backdrop that Trump promised historic deregulation. He stated numerous times during the campaign that he would cut regulations "massively," even boasting of a 75% cut—albeit without specifying exactly what that meant.

While that may have sounded like unrealistic campaign rhetoric, his administration has reduced the issuance of new regulations by more than 75%. In fact, the Trump administration issued just 33 major regulations in all of last year.

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While this reduction in new regulation has been a welcome reprieve for U.S. business, it is worth asking whether the administration will oversee actually *repealing* swaths of regulation. Congress made some effort at this early last year when it rescinded 15 regulations via the Congressional Review Act (CRA). However, most of those were minor or had not yet taken effect, so no one could construe this as



wholesale deregulation. What's more, the narrow Republican congressional majority may completely erode in 2019, which would obviate any additional use of the CRA.

What's more, the courts may soon start considering some of the Trump administration's delayed, withdrawn, and postponed regulations, which could delay or altogether stop further deregulation efforts. Indeed, several nongovernmental organizations

announced their intent to challenge every step of the Trump deregulatory agenda in court rather than allow an unwinding of the Obama regulatory legacy.

If Congress and the courts are unable or unwilling to acquiesce, the Trump administration's ability to craft a legacy of deregulation will be limited. What's more, any progressive president who succeeds Trump could immediately undo EO 13771 and reinstate the withdrawn regulations. In sum, to create anything as durable as previous successes in deregulation, Congress must play a greater role in regulatory oversight through both substantive and procedural reforms. Trump may have won 2017, but his regulatory legacy will be determined by what he next ushers through Congress.

A HISTORIC YEAR FOR DEREGULATION

The historical nature of the regulatory slowdown and retrenchment of 2017 can-

not be overstated. When President Obama left office, he left 116 new major rules in the regulatory pipeline, expecting that they would be implemented under a Hillary Clinton administration. Yet agencies under Trump have finalized only the 33 aforementioned major regulations in all of 2017, eight of which were either deregulatory in nature or published by independent agencies (e.g., the Federal Reserve or the

Consumer Financial Protection Bureau) outside of the administration's control.

The aggregate compliance costs imposed by all new regulations is a better metric for what actually transpired. In 2016 Obama promulgated more than \$164 billion in regulatory costs. Trump's deregulatory agenda actually *reduced* compliance costs by more than \$900 million just via his EO 13771. The cost savings of the rules rescinded under the CRA add another \$3 billion in regulatory cost reductions. This is unprecedented to be sure, but these savings are less than 2% of the estimated cost of the final rules promulgated in 2012 alone.

One-in, two-out / President Trump's one-in, two-out directive outraged progressives and initially left conservatives skeptical. The potential for gaming such a regime is high, and absent some sort of comprehensive retrospective cost-benefit analysis there is no reason to think that the order would achieve an optimal reform.

Because so few new regulations were issued, there was little two-out repeal of old rules. For instance, during the last nine months of 2017 (a period that avoids the rules rescinded when President Trump entered office), OIRA only concluded review of 46 final rules. As a comparison, in the last nine months of 2009 OIRA released 205 rules, and 207 in April–December 2001.

The Trump deregulatory agenda thus far entails issuing as few regulations as legally required, while concomitantly paring some of the controversial rules from the Obama administration—most notably the Clean Power Plan, the overtime expansion, and rules on hydraulic fracturing. Aside from the 15 CRA measures, this hardly counts as durable regulatory reform. The Trump administration appears to understand this reality.

MORE DEREGULATION AHEAD

With its past two Unified Agendas, the administration essentially transformed a planning document into a manifesto for its domestic policy agenda, with an entire section devoted to deregulatory actions. The administration has already repealed

at least five major rules and there are an additional 22 deregulatory actions on track to be completed by the end of 2018. While a few billion dollars in deregulatory measures might not move the needle on economic growth, the cumulative effort of the administration on reducing the regulatory burden is the most significant action along these lines since the Ronald Reagan era.

The intent of the one-in, two-out edict was to ensure that regulatory compliance costs did not increase in 2017. On this the administration succeeded, managing to reduce costs by nearly \$1 billion. For 2018 the administration aims to reduce the cumulative regulatory burden by \$9.8 billion, which would entail agencies reducing their regulatory impact by significant margins. For instance, the Departments of Defense and Energy must reduce costs by roughly \$1 billion each, the Department of Labor by \$1.9 billion, and Interior must slash nearly \$3 billion in compliance costs.

This effort constitutes more than an ad hoc reform. Of the 579 actions listed in the Unified Agenda, 448—fully 77%—are deregulatory according to the American Action Forum. However, the next administration can quickly reverse course, undo much of this deregulation, and go several steps beyond President Obama's regulatory expansion.

Administration-only action / There is much President Trump can do on federal regulation between now and his 2020 reelection fight. Rao recently noted that for every new regulatory action, agencies have pledged to promulgate *three* deregulatory actions—an ambitious goal to be sure, but no more so than the goal of reducing overall regulatory costs was in 2017. It is hard to see Congress or the courts moving to stop such efforts, at least in 2018.

Environmental Protection Agency Administrator Scott Pruitt's work has received the bulk of media attention so far and widespread ire from environmentalists. But the EPA has only reduced regulatory compliance costs by \$127 million since he joined the administration. The agency does have 41 active deregulatory actions in

the pipeline according to the latest Unified Agenda, and three are economically significant, including the repeal of fracking rules.

The biggest deregulatory prize to date may come from full repeal of the Clean Power Plan. The administration intends to issue a final rule to that effect in October 2018, but that is just the beginning of the battle to repeal the carbon standards. However, it's likely that the courts will be enjoined in the debate, stretching this fight out past the 2020 election at a minimum.

The Interior Department has 43 deregulatory actions planned, but only two are economically significant and both are vestiges of the Obama administration. The Department of Labor has 22 deregulatory actions planned, with just two economically significant rules. For perspective, the Obama administration issued nine economically significant labor regulations in 2016. Again, while such deregulatory actions may be unprecedented, they are a drop in the bucket and can easily be undone by Trump's successor.

Perhaps far-reaching regulatory reform could truly take shape with a more proactive OIRA. For instance, the administration could require independent agencies to submit regulations for review, which would ensure that all federal agencies' rules are subject to a rigorous interagency review process and cost-benefit analysis. Such a step would prove more durable than nearly any other regulatory action the administration has taken thus far. A future president may find it tricky to remove such an obvious "good government" requirement.

Such a reform would require a significant increase in OIRA staff, which would entail a bona fide investment by the Office of Management and Budget. That would come at a time when the White House has pledged its fealty to reducing federal employment, even if these staffers could ultimately help to reduce regulatory costs.

There is some evidence that OIRA is now demanding greater transparency from independent agencies. Administrator Rao has reminded the independent agencies that under the CRA her office has the responsibility of determining the status for

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major rules, which could ultimately mean that all actions eventually wind up at OIRA for at least some level of scrutiny. This could lay the groundwork for more robust review later in the Trump administration.

WHAT CONGRESS SHOULD DO ON REGULATORY REFORM

However, if the Trump administration really wants to reshape the regulatory state, it has to do more than just unwind some of the most controversial parts of the Obama regulatory agenda or make administrative changes to rulemaking procedures. Changes would need to be made to the statutes underlying regulatory regimes, as well as how federal agencies carry out rulemaking. Only Congress can accomplish that.

Congress can tackle substantive reform in the same manner that it vastly expanded the regulatory state during the last decade: by reforming financial sector regulations, deregulating the health care marketplace, and modernizing the National Environmental Policy Act and sundry environmental regulations. Broadly speaking, financial services (e.g., Dodd–Frank), health care (e.g., the Affordable Care Act), and environmental controls (e.g., controversial EPA actions outside of Congress) have added the most to the regulatory burden over the last 10 to 15 years, and those areas offer the greatest opportunity for reform.

The Trump administration, to a degree, is already proffering ideas for reform in these sectors, but they are piecemeal, subject to intense litigation, and likely to be unwound by a progressive successor. However, given the political will (and the votes), Congress could take the necessary steps to not just unwind some of the progressive achievements of the last decade, but also craft a limited-government vision of how regulation should govern these sectors and the American people broadly.

Congress currently has legislation addressing reforms in all three of the above-mentioned areas. None of that legislation is as magisterial as, say, the airline deregulation of the late 1970s, but these bills are resilient paths forward nonetheless. For

example, there is bipartisan support to reform Dodd–Frank by drastically raising the threshold for Systemically Important Financial Institution (SIFI) status and modernizing financial rules by ensuring that thousands of banks are exempt from the most onerous aspects of Dodd–Frank. This doesn't undo the law, but it is a substantive step forward that Congress and the administration can take in 2018. Its reforms would also persist past 2021.

In terms of process, there is a host of legislation that the House has already passed, but is now stalled in the Senate, that would revolutionize how agencies implement regulations. The effects of these procedural changes would be felt for decades and arguably have a greater effect than some minor substantive changes.

The most popular measure, and for some reason one of the most controversial, is the proposed Regulatory Accountability Act. It would institute a suite of reforms of the administrative process, which hasn't been seriously altered since Harry Truman was president. For instance, the bill would force agencies to allow public participation far earlier in the rulemaking process, primarily through greater use of advanced notices of proposed rulemaking. In addition, it would require agencies to choose the lowest-cost policy option that achieves the regulatory objective and it would greatly pare back the use of interim final rules, which agencies frequently abuse.

There are other ideas we would like to see this Congress consider, such as expanding the scope of regulations subject to cost–benefit analysis, removing the responsibility for performing cost–benefit analysis from the regulatory agency itself and assigning it to OIRA, and making OIRA a completely independent agency akin to the Congressional Budget Office in order to free it from its political overseers in the OMB. However, we fear that this Congress, with one eye firmly on the 2018 election, has concluded its foray into pruning back the regulatory state and will leave further reforms to a future Congress.

The substantive and procedural reforms outlined above are hardly radical. They

are achievable in this Congress and some have already passed in the House. Rather than progress through administration-only action, these reforms would cover the entire administrative state (procedural) and address some of the most overregulated parts of the economy (substantive).

To some observers, these efforts might appear trivial in light of the regulatory surge of the last decade, but some perspective is necessary. If passed, they would be the most consequential regulatory reforms of the last decade. If that's what Congress and the administration want to achieve in 2018, the table is set.

CONCLUSION

The extent of the Trump administration's deregulatory success has been a surprise to many. Few anticipated he would issue one-quarter the number of regulations as his predecessor while concomitantly pulling back proposed rules and even repealing some existing rules. Although conservatives and libertarians are generally pleased, progressives might accurately perceive that this can't go on much longer. It's likely the courts will soon enter the fray, leaving the rest of any fight up to the lawyers, not the bureaucrats.

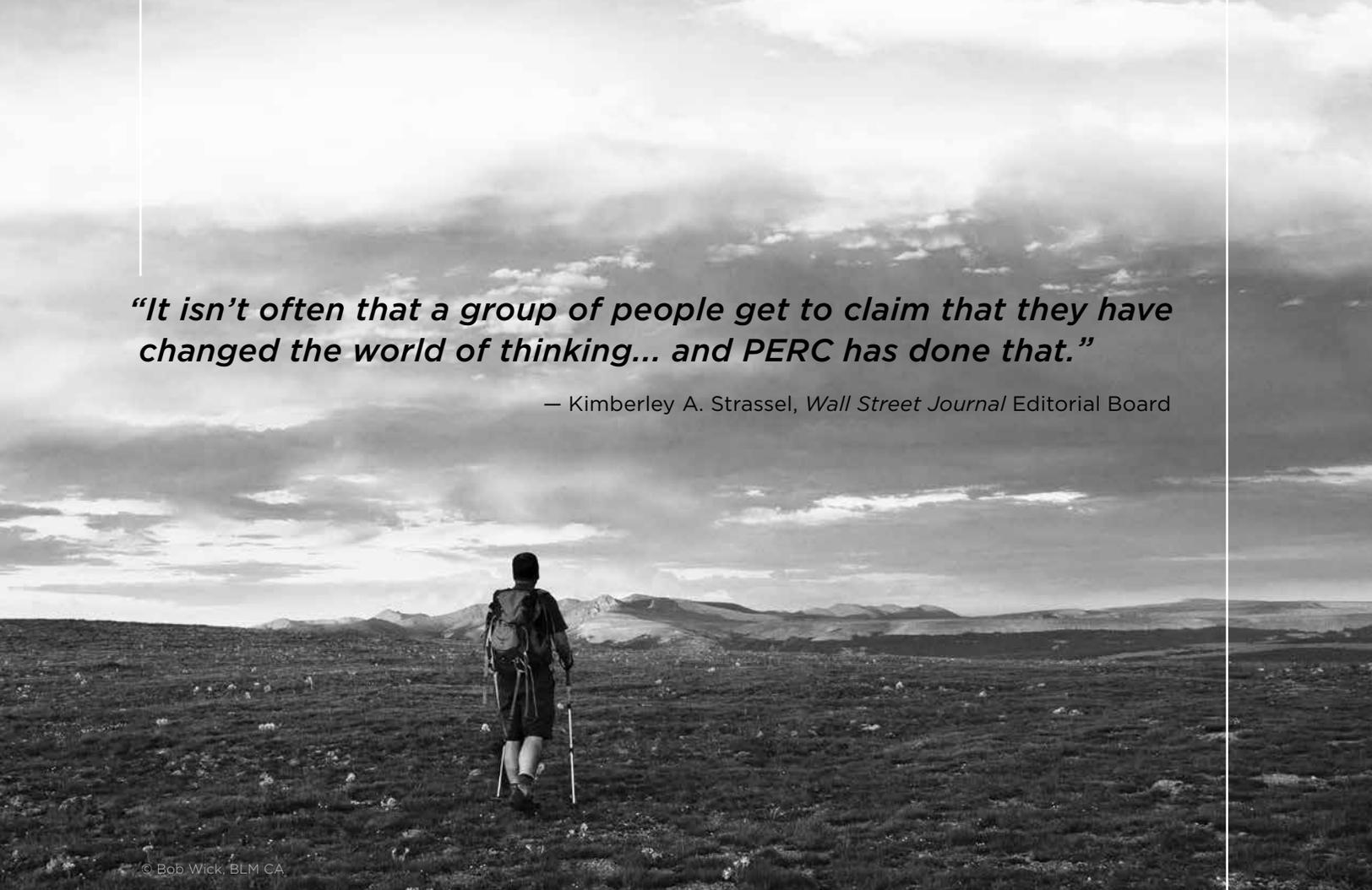
What matters most for a durable legacy of reform is not the pace of new regulations issued, but how the Trump administration and Congress change regulatory culture and practice, both through substantive reforms and through process. For the administration, this means extending OIRA's oversight to independent agencies, increasing its staff, and invalidating a portion of previously issued guidance documents that go beyond what the regulation explicates. For Congress, this means fundamental reform of health care, financial regulation, and environmental rules, in addition to sustainable regulatory process reforms.

Oversight of the regulatory state can be difficult. Regulatory proposals can be complicated and the appetite for Congress to weigh in on such narrow matters is fleeting at best. Establishing greater oversight authority with the power to push back on all regulations may be the best we can do. **R**

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