



Trump's Deregulatory Record:

An Assessment at the Two-Year Mark

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MARCH 2019

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ACKNOWLEDGEMENTS

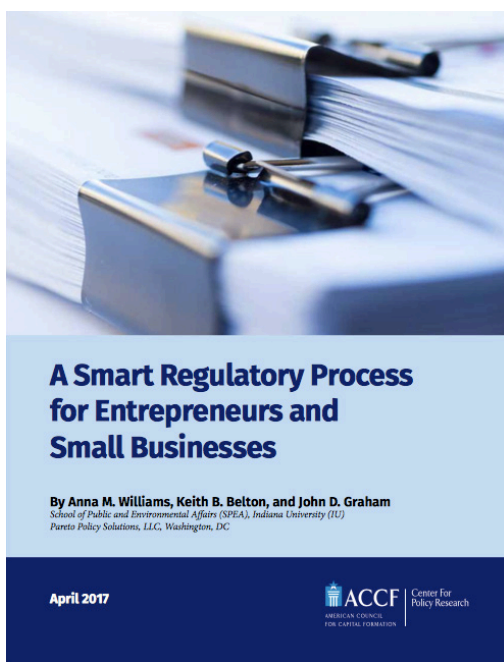
This report was commissioned by the American Council on Capital Formation (ACCF) Center for Policy Research (accf.org, Washington, DC). The authors are fully responsible for the content of the report. The findings do not necessarily represent the views of ACCF or the Indiana University School of Public and Environmental Affairs. Special thanks are due to the numerous experts in regulatory policy, listed in the Appendix, who answered questions, offered useful perspectives, and/or provided useful information for this report. We also appreciate the comments of the diligent peer reviewers, also listed in Appendix A, whose critiques have helped strengthen the quality of the report.

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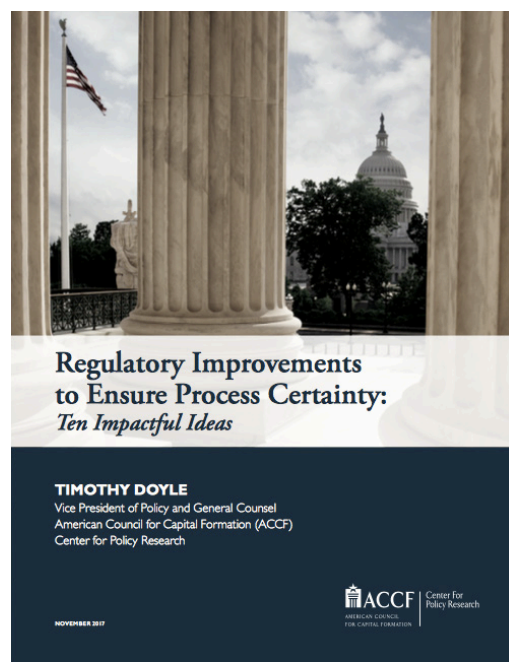
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EXECUTIVE SUMMARY

In his campaign for the US presidency, candidate Donald Trump advocated widespread deregulation of the US economy. It was a central plank of his national economic and energy plans, as outlined in major speeches in Detroit, Michigan (August 8, 2016) and Pittsburgh, Pennsylvania (September 22, 2016). He called for both a moratorium on new regulations and an explicit process whereby Cabinet departments would review existing regulations and repeal each one that was not necessary.

America's 45th president, Donald Trump, has followed through with an aggressive program of deregulation. Operationally, deregulation has meant (1) slowing the flow of new federal regulations, (2) collaborating with Congress on the repeal or scaling back of selected existing regulations, and (3) using executive power to repeal or curb the scope and/or stringency of selected existing regulations.

But, intentions are one thing; actions are something different. Is the Trump administration actually accomplishing deregulation?

In this report, we assemble the best available evidence as to what the Trump administration has accomplished on deregulation during Donald Trump's first two years in office. Our major findings are as follows.

- The flow of new regulations under the Donald Trump administration has been much smaller than observed during the Barack Obama and George W. Bush administrations.
- The Trump administration has been somewhat effective in working with Congress on legislative acts of deregulation.
- Progress toward reviewing and removing the huge body of existing regulations has been slow, though there are some completed deregulatory rulemakings.
- The Trump Administration has underway 514 deregulatory rulemakings on a wide range of issues at different federal agencies.
- There are early signs that Trump's deregulatory agenda is being blocked or delayed by decisions in the federal judiciary.
- The Trump administration is undertaking several deregulatory actions related to climate change, but those actions are vulnerable to delay or reversal through judicial or legislative interventions.
- An unintended consequence of federal deregulation under Trump has been determined growth in some state and local regulations on some issues.

Taking as a given the Trump administration commitment to deregulation, we offer the following recommendations to enhance the effectiveness and durability of the agenda.

- The unfilled leadership posts at federal agencies should be filled by the Trump administration as soon as possible.
- When the Office of Management and Budget (OMB) reports the number of deregulatory and regulatory actions, the same types of actions should be counted on the regulatory and deregulatory sides of the ledger.
- New tools are needed to measure the impact of regulatory and deregulatory actions as to their impact on freedom.
- The foregone benefits of regulation need to be taken seriously in regulatory impact analyses, agency decision making and OMB communications about federal regulatory policy.
- The Trump administration should revise its climate rulemakings to make them less vulnerable to judicial reversal; given the changing composition of the Congress, it should also consider a legislative initiative on climate policy.
- When devising federal regulatory and deregulatory solutions, the Trump administration should take into account the prospects of future state and local regulations.

In assessing Trump's record, we have not examined the economic, public health, social or environmental impacts of Trump's deregulation agenda. Thus, we take no stance as to whether the agenda as a whole (or any specific deregulatory action) is good for the welfare of the United States or the world.

The audience for this report includes scholars of regulation, administrative law, and the presidency, think tanks and advocacy groups that focus on regulatory policy, stakeholders interested in regulatory policy, members of Congress and their staff, judges and law clerks who review regulations, political appointees and career civil servants in the federal executive branch, state and local officials, and reporters who cover regulation and the Trump administration.

1.0 INTRODUCTION

Donald Trump displays a determination to go down in history as a deregulator.¹ This is surprising because no other post-World War II president, with the possible exception of Ronald Reagan, has exhibited such a public commitment to this issue.

Both Democratic and Republican presidents have been interested in controlling the rulemaking process.² Let us consider first the Democratic and then the GOP presidents in the post-Watergate era.³

Jimmy Carter was a pioneer of efforts to deregulate the airlines and railroads but he also expanded regulation of the energy sector, supported extensive environmental regulation, and intensified occupational regulation of cotton dust and other toxic substances.⁴ He was a champion of efforts to reduce the paperwork burdens of regulation, as he signed the Paperwork Reduction Act that authorized creation of the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB).⁵ Carter also issued the first presidential executive order promoting agency use of cost-effectiveness analysis in the rulemaking process and gave professional economists a stronger voice in regulatory deliberations.⁶

Bill Clinton, through presidential Executive Order 12886 (which is still in effect today), modernized the centralized process of federal regulatory oversight that was established by President Reagan. Clinton's order focused OIRA's limited oversight resources on significant rulemaking activities and

promoted interagency coordination to improve the quality of regulations.⁷ Some progressives objected that Clinton's EO 12866 was "similar to the requirements of the (Reagan) order it replaced."⁸ But, a close reading of the two EOs reveals that the Clinton EO replaced the quantitative cost-benefit test in the Reagan EO with a new "benefits-justify-costs" test that authorizes consideration of qualitative factors such as distributional equity.⁹ Despite opposition from a conservative Congress, Clinton championed tighter regulation of tobacco, air pollution, and commercial activity in national forests.¹⁰

Barack Obama used executive power to stimulate retrospective review of existing regulations.¹¹ He also strived, in the context of trade negotiations, to accomplish more regulatory cooperation between the US and the European Union. And Obama began to introduce evidence from the emerging field of behavioral economics into regulatory analysis and decision making.¹² When the Republicans captured a majority of the House of Representatives in 2010, President Obama relied less on legislation and more on executive power, especially regulation, to advance his progressive policy ideals. His second term included a suite of major regulations aimed at curbing greenhouse gas emissions from the US economy.¹³

It should not be surprising that modern Democratic presidents have not made deregulation a signature theme, as federal regulation is seen as a crucial tool for protecting rights, advancing public wellbeing, and accomplishing the policy aspirations of several key constituencies of the Democratic Party (e.g., environmentalists, labor unions, and civil rights advocates). Presidents Carter, Clinton and Obama used rulemaking power, including OIRA, to advance their

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- 1 "Read Donald Trump's Economic Speech in Detroit." Time. August 8, 2016. Time.com; John W Miller. Donald Trump Promises Deregulation of Energy Production. Wall Street Journal. September 22, 2016.
 - 2 Cornelius M. Kerwin. Rulemaking: How Government Agencies Write Law and Make Policy. CQ Press. Washington, DC, 2003, 118-123.
 - 3 For a historical argument that there were precursors to regulatory reform in the Johnson, Nixon and Ford administrations, see Jim Tozzi. OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding. Administrative Law Review. 63. 2011, 37-69.
 - 4 On airline deregulation, see Stephen G. Breyer. Regulation and Its Reform. Harvard University Press. Cambridge, MA. 1982, 317-340, including President Carter's appointment of economist Alfred Kahn (a deregulation expert) to the chairmanship of the Civil Aeronautics Board, 342; Robert E Litan, William D Nordhaus. Reforming Federal Regulation. Yale University Press. 1983, 67-81 (on the Carter administration's regulatory tendencies and the case of the OSHA cotton-dust standard).
 - 5 Joseph Cooper, William West. Presidential Power and Republican Government: The Theory and Practice of OMB Review. Journal of Politics. 50. 1988, 864-95; Donald R. Arbuckle. Obscure but Powerful: Who Are Those Guys? Administrative Law Review. 63. 2011, 131-134; Cass R Sunstein. The Office of Information and Regulatory Affairs: Myths and Realities. Harvard Law Review. 126(7). 2012. 1838-78.
 - 6 Executive Order Number 12,044. 43 Fed. Reg. 12661 (March 24, 1978); Phillip J. Cooper. The War Against Regulation: From Jimmy Carter to George W. Bush. The War against Regulation. The University of Kansas Press. 2009, 16 ("...Carter was largely responsible for changing the character of discussion and policymaking efforts on regulation such that economists came to occupy a central if not dominant importance"); W Kip Viscusi. Fatal Tradeoffs: Public and Private Responsibilities for Risk. Oxford University Press. 1992, 255 (on the roles of the Council on Wage and Price Stability and the Regulatory Analysis Review Group).
 - 7 Executive Order Number 12866. 58 Fed. Reg. 51735 (September 30, 1993); Cornelius M. Kerwin. Rulemaking: How Government Agencies Write Law and Make Policy. Third Edition. CQ Press. Washington, DC. 2003, 228-9.
 - 8 Phillip J. Cooper. The War Against Regulation: From Jimmy Carter to George W Bush. University of Kansas Press. 2009, 77.
 - 9 In defense of the "benefits-justify-costs" test, John D. Graham. Saving Lives through Administrative Law and Economics. University of Pennsylvania Law Review. 157(2). 2008, 395, 432-434.
 - 10 Steven P Croley. Regulation and Public Interests: The Possibility of GOOD Regulatory Government. Princeton University Press. 2008, 163-212.
 - 11 Executive Order Number 13563. 76 Fed. Reg. 3821 (January 21, 2011); Executive Order 13,579. 76 Fed. Reg. 41587 (July 14, 2011); Executive Order Number 13610. 77 Fed. Reg. 28469 (May 10, 2012).
 - 12 Benjamin Wallace. Cass Sunstein Wants to Nudge Us. New York Times Magazine. May 13, 2010.
 - 13 John D. Graham. Obama on the Home Front: Domestic Policy Triumphs and Setbacks. Indiana University Press. 2016, 224-236.

policy agendas.¹⁴ Those same presidents did initiate some retrospective review of existing regulations, but extensive deregulation was neither intended nor accomplished.¹⁵

It is more surprising, perhaps, that Donald Trump's deregulatory stance is notably different from the stances of previous Republican presidents. Consider the regulatory positioning of George W. Bush (Bush 43), George Herbert Walker Bush (Bush 41), and Ronald Reagan.

After the tragic events of September 11, 2001, Bush 43 worked with Congress to create a large new Cabinet agency, the Department of Homeland Security, and made aggressive use of federal regulatory power to make the homeland safer.¹⁶ Bush 43 expressed particular concerns about regulatory burdens on small business and manufacturing, and he opposed regulation of greenhouse gases through the Kyoto Protocol. Bush did launch some deregulatory initiatives in the energy and environmental arenas, but some were blocked by federal judicial decisions.¹⁷ Bush rarely used the word "deregulation" and it certainly was not a signature theme of his two terms in office. Bush 43 was a proponent of "smarter regulation" through use of science and economics.¹⁸ His administration's OMB Circular A-4 on "Regulatory Analysis" (2003) continues today to guide Cabinet agencies on how to perform regulatory impact analyses.¹⁹

President George Herbert Walker Bush (Bush 41) was certainly not a deregulator, indeed a cover story of the *National Journal* described him as "The Regulatory President."²⁰ His administration championed vast new federal regulatory programs to enhance urban air quality and protect the rights of the disabled.²¹ He also stimulated and signed the United Nations Framework Convention on Climate Change, which helped spawn new laws and regulations to address climate change throughout the world.²² Bush 41's one-term administration did launch the Quayle Council on Competitiveness to lessen the burden of regulation in a variety of areas.²³ And Bush 41 stimulated innovation in market-based approaches to regulation, especially in air pollution control.²⁴

Trump's deregulatory bent does bear some resemblance to the early positioning of America's 40th President, Ronald Reagan.²⁵ Working from a campaign platform of "regulatory relief", Reagan's first two years in office had a strong deregulatory theme, including a visible Presidential Task Force on Regulatory Relief established by one of Reagan's first presidential acts in 1981. The Task Force, led by Vice President George Herbert Walker Bush, had some significant achievements, especially in the highly depressed auto sector.²⁶ However, Reagan lost in the Supreme Court a key effort to repeal the automobile airbag regulation.²⁷ The administration's deregulatory focus waned after the first two years of the administration as the economy recovered; the Task Force was disbanded in 1983.²⁸

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- 14 Elena Kagan. Presidential Administration. Harvard Law Review. 114. 2001, 2245-385; Cass Sunstein. Simpler: The Future of Government. Simon and Shuster. New York, New York. 2013.
- 15 Susan Dudley. A Retrospective Review of Retrospective Review. Regulatory Studies Center. George Washington University. May 7, 2013; SE Miller. Learning from Experience: Retrospective Review of Regulations. Regulatory Studies Center. George Washington University. 2014; Jonathan B Wiener, Daniel L Riberi. Environmental Regulation Going Retro: Learning from Hindsight. Journal of Land Use. 32. Fall 2016. 1-73; Connor Raso. Assessing Regulatory Retrospective Review under the Obama Administration. Center on Regulation and Markets. Brookings Institution. Washington, DC. June 15, 2017; JE Aldy. Learning from Experience: An Assessment of the Retrospective Reviews of Agency Rules and Evidence for Improving the Design and Implementation of Regulatory Policy. Report prepared for the Administrative Conference of the United States. Washington, DC. 2014; Richard Morgenstern. Retrospective Analysis of US Federal Environmental Regulation. Journal of Benefit-Cost Analysis. 9(2). Summer 2018, 285-304.
- 16 Phillip J Cooper. The War Against Regulation: From Jimmy Carter to George W. Bush. University Press of Kansas. 2009, 93 (Bush 43's dramatic expansion of regulatory power on homeland security drew public attention away from his numerous deregulatory activities).
- 17 For example, see Matthew Dalton. Court Overturns Bush Clean Air Act Exemption in Loss for Power Industry. Wall Street Journal. March 18, 2006; John D. Graham. Bush on the Home Front: Domestic Policy Triumphs and Setbacks. Indiana University Press. 2010, 194-220.
- 18 John D Graham. Saving Lives through Administrative Law and Economics. University of Pennsylvania Law Review. 157(2). 2008. 395-540; Curtis Copeland. Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs. Congressional Research Service. Washington, DC. 2009.
- 19 Office of Management and Budget. Circular A-4: Regulatory Analysis. Washington, DC. 2003.
- 20 Jonathan Ranch. The Regulatory President. National Journal. November 30, 1991, 2905; also see Barry D Friedman. Regulation in the Reagan-Bush Era: The Eruption of Presidential Influence. University of Pittsburgh Press. 1995.
- 21 Phillip J Cooper. The War against Regulation: From Jimmy Carter to George W. Bush. University of Kansas Press. 2009, 47.
- 22 "Let's Celebrate the 25th Anniversary of the Climate Convention". June 19, 2017, unfccc.int, accessed November 5, 2018.
- 23 Philip J Hilts. At Heart of Debate on Quayle Council: Who Controls Federal Regulations? New York Times. December 16, 1991.
- 24 Statement of Fred Krupp. President, Environmental Defense Fund. The Environmental Legacy of President George H.W. Bush. December 1, 2018.
- 25 The concerns progressives express about Trump's deregulatory stance are similar to the concerns they expressed about President Reagan's program of regulatory relief. See Susan J. Tolchin, Martin Tolchin. Dismantling America: The Rush to Deregulate. Houghton Mifflin Company. Boston, Massachusetts. 1983, 39-71.
- 26 The Reagan Task Force on Regulatory Relief conducted 119 reviews of "inherited rules". By August 1983, the administration had taken final action to revise or eliminate 76. Partial or formal proposals were in process for 27 others; the remainder were still under review. Presidential Task Force on Regulatory Relief. Reagan Administration Regulatory Achievements. Washington, DC. August 11, 1983. W Kip Viscusi. Fatal Tradeoffs: Public and Private Responsibilities for Risk. Oxford University Press. 1992, 266-269, especially Table 14-6 (Reagan's regulatory relief for the car industry). Also see James C Miller. The Early Days of Reagan Regulatory Relief and Suggestions for OIRA's Future. Administrative Law Review. 63. 2011, 93-101.
- 27 Motor Vehicle Manufacturers Association v. State Farm Insurance, 463 U.S. 29 (1983).
- 28 W. Kip Viscusi. Fatal Tradeoffs: Public and Private Responsibilities for Risk. Oxford University Press. 1992, 251, 289-290 ("The deregulation effort did not even last through the first Reagan term"); Michael Fix, George C. Eads. The Prospects for Regulatory Reform: The Legacy of Reagan's First Term. Yale

A well-kept secret is that Reagan also had numerous pro-regulation activities, especially in the environmental arena. His administration accelerated the phase out of lead in gasoline, phased out chlorofluorocarbons under the Montreal Protocol (an international agreement), added stricter air quality standards for particulate matter, and supported the highly prescriptive 1984 Hazardous and Solid Waste Amendments (HSWA) to the Resource Conservation and Recovery Act.²⁹

Taking his two terms into account, Reagan's most important accomplishment in regulatory policy was not deregulation but a procedural innovation: He issued Executive Order 12291 to establish the OIRA-led federal interagency review process, including cost-benefit analysis of regulations.³⁰ Under this process, all proposed and final rules must be cleared by OIRA before the regulatory agency publishes them in the *Federal Register*. That process has been largely retained by all of his Oval Office successors from both parties, and a growing literature documents the influence of OIRA.³¹

“ Trump’s deregulatory bent does bear some resemblance to the early positioning of America’s 40th President, Ronald Reagan. ”

Some commentators object to President Trump’s focus on deregulation and wish that he would have taken a more nuanced stance on federal regulatory policy.³² This report does not address whether Donald Trump should have taken a different campaign position or presidential stance on regulatory policy. In assessing Trump’s record, we have not evaluated the economic, public health, social and environmental impacts of Trump’s deregulation agenda. Thus, we take no stance as to whether the agenda as a whole (or any specific deregulatory action) is good for the United States or the world.

The goal of this report is to determine whether the Trump Administration is accomplishing deregulation, given that Donald Trump made deregulation an administration priority. In the field of presidential studies, this question is one of

presidential effectiveness, not one of presidential virtue or policy desirability.³³ President Trump has finished his second year in office, so it is timely and appropriate to consider what he has and has not accomplished on deregulation, why he has not accomplished more deregulation, and what additional steps might be required to accomplish his agenda.

The report is organized as follows. Section 2.0 defines deregulation, considers how President Trump and his close advisors use the term, and clarifies which facets of deregulation this report covers. Section 3.0 explores why Trump advocates deregulation based on his own words and those of his close advisors. Section 4.0 describes Trump’s new “two-for-one” policy of deregulation and critiques some of the early

accounting that the Trump administration has publicized under this policy. Section 5.0 argues why the Trump administration needs new tools to measure changes in human freedom, as that is the non-economic value that appears to be central to the Trump agenda. Section 6.0 explores the complications in distinguishing regulation from deregulation. Section 7.0 covers Trump’s regulatory budgeting

initiative and the challenges of practical implementation of this initiative. Section 8.0 reports the results of our assessment, organized into seven key findings, while Section 9.0 summarizes six recommendations for the administration, accepting the premise that deregulation is an administration priority. We stress that we offer no normative stances on Trump’s deregulatory agenda, as we have not assessed the potential impacts on economic, social, public health and environmental outcomes.

2.0 WHAT IS DEREGULATION?

Wikipedia defines “deregulation” as “the process of removing or reducing state regulations, typically in the economic sphere.” This definition seems consistent with the

Journal on Regulation. 5(2). 1985, 293.

29 The histories of the lead-phaseout and chlorofluorocarbon regulations are examined in John D. Graham and Jennifer Kassalow Hartwell (ed). *The Greening of Industry: A Risk-Management Approach*. Harvard University Press. 1997; William L. Rosbe, Robert L. Gulley. *The Hazardous and Solid Waste Amendments of 1984: A Dramatic Overhaul of the Way America Manages its Hazardous Wastes*. *Environmental Law Review*. 14. 1984, 10458; EPA. Table of Historical Particulate Matter (PM) National Ambient Air Quality Standards (NAAQS). <https://www.epa.gov/pm-pollution/table-historical-particulate-matter-pm-national-ambient-air-quality-standards-naaqs>, retrieved February 4, 2019.

30 Executive Order 12291 – Federal Regulation. *Federal Register*. February 19, 1981, pp. 13193-13198; Christopher C. DeMuth, Douglas H. Ginsburg. *White House Review of Agency Rulemaking*. 99(5). 1986, 1075-88.

31 William F West. *The Institutionalization of Regulatory Review: Organizational Stability and Responsive Competence at OIRA*. *Presidential Studies Quarterly*. 35(1). February 8, 2005, 75-93; Steven Croley. *White House Review of Agency Rulemaking: An Empirical Investigation*. *University of Chicago Law Review*. 70. 2003, 821-85; Lisa Schulz Bressman, Michael P Vandenberg. *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*. *Michigan Law Review*. 105(1). 2006. 47-100; Simon F. Haeder, Susan Webb Yackee. *Presidentially Directed Policy Change: The Office of Information and Regulatory Affairs as Partisan or Moderator*. *Journal of Public Administration Research and Theory*. 2018, 1-14; Alex Acs. *Policing the Administrative State*. *Journal of Politics*. 80(4). 2018, 1225-1238

32 See Heidi Shierholz, Celine McNicholas. *Understanding The Anti-Regulation Agenda*. Economic Policy Institute. Washington, D.C. April 11, 2017. www.epi.org

33 John D. Graham. *Obama on the Home Front: Triumphs and Setbacks*. Indiana University Press. 2016, 27-65.

common-sense way that President Trump is using the term, but there are some related terms worthy of clarification.

The new regulations adopted each year represent the “flow” of regulatory activity while the “stock” of regulations are the accumulated body of existing regulations.³⁴ The Trump administration is concerned about both the flow and stock.³⁵

This report focuses on three aspects of Trump’s deregulatory agenda. First, has the administration curbed the flow of new regulations, thereby slowing the growth of the stock of regulation? Second, has the administration worked with the Republican-majority Congress to repeal or scale back existing regulations from the stock? Finally, with executive power, has the administration repealed existing regulations or revised them to be less burdensome or intrusive?

In this report, we do not include other aspects of deregulation such as easier access to permits for economic activity (adjudicatory activity), removal of quasi-regulatory guidance, issuance of more permissive guidance to regulatees, and relaxed enforcement activities against potential violators. There is much press activity suggesting that the Trump administration is implementing all of these softer facets of deregulation.³⁶ We do not address them in this report, in part because there is no centralized federal database on such actions and in part because it is relatively easy for a new administration to reverse each of these softer forms of deregulation.³⁷

3.0 WHY TRUMP FAVORS DEREGULATION

Prior to Trump’s presidency, the predominant view on federal regulation was that Congress, with its limited attention span

and expertise, should provide the executive branch with broad regulatory authority, and then allow the expert regulatory agencies, under presidential oversight, to determine how many regulations are appropriate and how each regulation should be designed, implemented, and enforced.³⁸ This view of the modern administrative state extends back to President Franklin D. Roosevelt, when he expanded regulatory power in the 1930s to help the country escape the Great Depression.³⁹ It also reflects the views of Woodrow Wilson concerning the expert function of public administration.⁴⁰

Congress did have strong concerns about the growth of government and responded in 1946 with the Administrative Procedure Act (APA) to ensure some checks on the growing powers of federal agencies. The APA provides for standardized procedures in rulemaking, public comment opportunities, and independent judicial review.⁴¹ Aside from the APA, the expansive view of the modern administrative state has carried the day for more than 70 years.⁴² Indeed, the 1960s and 1970s were decades when Congress delegated vast additional power to the social regulatory agencies that address public health, consumer protection, safety, civil rights, and the environment.⁴³

During the 2016 presidential campaign, candidate Donald Trump took a stark and distinctive stance on the modern administrative state. He advocated widespread deregulation of the US economy. It was a central plank of his national economic and energy plans, as outlined in major speeches in Detroit, Michigan (August 8, 2016) and Pittsburgh, Pennsylvania (September 22, 2016).⁴⁴ He called for both a moratorium on new regulations and an explicit process whereby Cabinet departments would review existing regulations and repeal each one that was not necessary.

34 On the importance of the stock vs flow distinction, see Bridget CE Dooling, *Trump Hit the Regulatory Brake But Hasn’t Found Reverse Gear*, The Hill, August 30, 2018.

35 Some commentators use a more narrow definition of “deregulation” such as removal of existing regulations through administrative rulemaking. Stuart Shapiro, *Trump’s Deregulatory Record Doesn’t Include Much Actual Deregulation*, The Conversation, May 10, 2018.

36 See, for example, Eric Lipton, Hiroko Tabuchi, *Driven by Trump Policy Changes, Fracking Booms on Public Lands*, New York Times, October 27, 2018; Laurent Belsia, *Trump’s Deregulation Drive is Epic in Scale and Scope. And Yet...*, Christian Science Monitor, January 5, 2018.

37 For a recent article suggesting that most of Trump’s “deregulation” is of this easily reversible form, see Richard J. Pierce, Jr., *Regulatory Reform under President Trump*, *Utilities Law Review*, In press; also see Richard J. Pierce, Jr., *Regulatory Reform Under Reagan and Trump*, *The Regulatory Review*, Penn Program on Regulation, July 30, 2018, www.theregreview.org.

38 James M Landis, *The Administrative Process*, Yale University Press, 1938; on the need for delegation of power from Congress to expert agencies, see Stephen Breyer, *Active Liberty: Interpreting our Democratic Constitution*, Vintage Books, 2005, 102-108; and for a normative defense of broad delegation, see Edward H Stiglitz, *Delegating for Trust*, *University of Pennsylvania Law Review*, 166, 2018, 633, 637-40 (emphasizing expertise, transparency, and judicial supervision).

39 Cass Sunstein, *Free Markets and Social Justice*, Oxford University Press, 1997, 319-322.

40 Wilson, a political scientist, had in mind a science of public administration. Donald F Kettl, James W Fesler, *The Politics of the Administrative Process*, Fourth Edition, CQ Press, 2009, 38-42. For a contemporary critique of Wilson’s view, see Michael W Spicer, *In Defense of Politics in Administration: A Value Pluralist Perspective*, University of Alabama Press, 2010.

41 Cornelius M Kerwin, *Rulemaking: How Government Agencies Write Law and Make Policy*, CQ Press, 2003, 2-3.

42 Richard B Stewart, *The Reformation of American Administrative Law*, *Harvard Law Review*, 88, 1975, 1667.

43 Cass R Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State*, 1990, 24; also see Richard L.N. Andrews, *Economics and Environmental Decisions, Past and Present*, In *Environmental Policy Under Reagan’s Executive Order* (ed., V Kerry Smith), University of North Carolina Press, 1984, 52-54, Table 2.1 (on the dramatic expansion of health, safety and environmental regulation starting around 1970).

44 “Full Text: Donald Trump’s Detroit Speech on his Economic Plan,” *Remarks as Prepared for Delivery*, Politico.com, August 8, 2016; Coral Davenport, *Donald Trump in Pittsburgh, Pledges to Boost Both Coal and Gas*, New York Times, September 22, 2016; Tom Fontaine, *Trump Woos Oil, Gas Industry in Pittsburgh Visit*, *Tribune Review*, September 22, 2016.

Some of his advisors referred to “deconstruction” of the administrative state.⁴⁵ Once in office, Trump elaborated on his case for deregulation.

Specifically, on December 14, 2017, in the Roosevelt Room of the White House, President Trump offered his most in-depth public remarks on deregulation.⁴⁶ He re-emphasized the economic rationale for deregulation, describing it as part of his economic plan and thus as a way to liberate entrepreneurs and enhance the level of prosperity in the US economy. Interestingly, he also offered a more philosophical and quasi-Constitutional rationale for deregulation that is rooted in a defense of individual liberty and democracy.

President Trump stated: “This excessive regulation does not just threaten our economy, it threatens our entire constitutional system. . . Congress has abandoned much of the responsibility to legislate, and has instead given unelected regulators . . . extraordinary power to control the lives of others. The courts have let this massive power grab go almost completely unchecked and have almost always ruled in favor of big government.” Instead of seeing regulation as a tool for advancing public welfare and protecting rights, President Trump sees deregulation as “regaining our heritage, and rediscovering what we can achieve when our citizens are free to follow their hearts and chase their dreams.”⁴⁷

The Trump administration’s quasi-constitutional rationale is important because it suggests that the administration might be inclined to remove or scale back some regulations, even if it cannot be shown that those acts of deregulation have tangible cost savings that justify the foregone benefits of regulation.⁴⁸ In this respect, the Trump administration is not defending liberty on solely utilitarian grounds, as was common in the foundational writings of English philosophers Jeremy Bentham and John Stuart Mill.⁴⁹

Regulation is seen by the Trump administration as an “intrusion” on the freedoms of private citizens and enterprises, an intrusion that can be justified philosophically only by

explicit authorizations by the US Congress, subject to judicial review for constitutional validity.⁵⁰ Trump’s perspective is closely connected to a conservative legal philosophy that is gaining favor within the Federalist Society and conservative think tanks. President Trump’s initial White House General Counsel (Donald McGahn), in 2017 remarks to the Federalist Society, made a pointed claim to a sympathetic audience: “The ever-growing, unaccountable administrative state is a direct threat to individual liberty.”⁵¹

The late Supreme Court Justice William Rehnquist started some of the modern questioning of the constitutionality of broad, vague delegations of power by Congress to the executive branch.⁵² A related view is that federal judges, through acceptance of the so-called Chevron doctrine, are giving unaccountable regulators too much discretion in the interpretation of ambiguous statutes.⁵³ In recent years, conservative legal theorists and judges have extended and elaborated Rehnquist’s reasoning about the non-delegation doctrine, but much has also been written contesting the late Justice Antonin Scalia’s expansive view of the non-delegation doctrine.⁵⁴

Based on his remarks on December 14, 2017, it is not entirely clear whether President Trump is primarily concerned about protecting freedom or protecting democracy (defined by what Congress, an elected body of legislators, prefers). We assume that Trump favors rejuvenation of the non-delegation doctrine primarily because Congress would likely enact fewer intrusions on freedom than regulatory agencies do under current broad delegated authority. Trump does appear to be somewhat more tolerant of intrusions imposed by Congress, presumably because the public can hold legislators accountable when elections occur, but he has also been quite critical of legislative intrusions on freedom such as those imposed by Congress under the Affordable Care Act. It may be instructive that both of President Trump’s appointees to the US Supreme Court, Neil Gorsuch and Brett Kavanaugh, have expressed concerns about the immense powers of the modern administrative state

45 Philip Rucker, Robert Costa. Bannon Vows a Daily Fight for “Deconstruction of the Administrative State.” Washington Post. February 23, 2017.

46 “Remarks by President on Deregulation.” Roosevelt Room. White House. December 14, 2017.

47 “Remarks by the President on Deregulation.” Roosevelt Room, White House. December 14, 2017.

48 OIRA has stated explicitly that it is not sufficient for a proposed regulation to have benefits that exceed costs. Regulatory actions “should have benefits that substantially exceed costs.” OIRA Introduction to the Fall 2018 Regulatory Plan. 2018, p. 5. Available at <https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201810/VPStatement.pdf>.

49 John Stuart Mill. On Liberty. 1859; Robert Paul Wolff. The Poverty of Liberalism. Beacon Press. Boston, MA. 1968, 5-6.

50 OIRA. Introduction to the Fall 2018 Regulatory Plan. 2018. Available at <https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201810/VPStatement.pdf>.

51 White House General Counsel Donald McGahn. Keynote Remarks. Federalist Society’s 2017 National Lawyers Convention. November 17, 2017 (video). [C-SPAN.org](https://www.c-span.org/).

52 Industrial Union Department, AFL-CIO v American Petroleum Institute, 448 U.S. Sup Ct. 607, 671 (Rehnquist dissent) (1980).

53 Michael McConnell. Kavanaugh and the “Chevron Doctrine”. Hoover Institution. July 30, 2018. For a more sympathetic view of an enlightened Chevron doctrine, see Stephen Breyer. Active Liberty: Interpreting Our Democratic Constitution. Vintage Books. 2005, 102-108

54 See David Schoenbrod. Power Without Responsibility. Yale University Press. 1993; Whitman v American Trucking Association, 531 U.S. 457, 487 (2001) (Thomas, J, concurring) (expressing broad constitutional concerns about delegation of power); Philip Hamburger. Is Administrative Law Unlawful? University of Chicago Press. Chicago, Illinois. 2014; William K Kelley. Justice Scalia, the Nondelegation Doctrine, and Constitutional Argument. Notre Dame Law Review. 92(5). 2017, 2106-2127.

and the resulting threats to freedom and democracy in the United States.⁵⁵

Relatedly, the Trump administration is working with agencies to make sure that regulators do not exceed their statutory authority when issuing regulations. OIRA expects agencies to implement the “best” reading of the statute, not merely a “reasonable” one.⁵⁶

We do not ask readers to agree with the quasi-constitutional argument Trump is making or to endorse the position that the non-delegation doctrine, which has often been ignored by the federal judiciary since the 1930s, should be revived. There is already a substantial legal literature defending Congress’s broad delegations of power to the executive branch and questioning the constitutional significance of the non-delegation doctrine.⁵⁷ There is also some recent scholarship suggesting that the non-delegation doctrine, properly understood, is not nearly as dead as conservatives fear.⁵⁸

We nonetheless emphasize the Trump administration’s non-economic rationale for deregulation because it should help readers understand why the Trump Administration might favor deregulation in specific instances, even when regulated businesses, pro-business Republicans and/or professional economists do not support deregulation. In this respect, the Trump administration appears to be giving greater weight to the freedom considerations than the welfare-economic considerations that were the focus of some previous administrations.⁵⁹

4.0 THE “TWO-FOR-ONE” POLICY

If the deregulatory rationale is not solely about the economy, then some non-monetary metric is needed to ascertain whether the Trump Administration is reducing government intrusion into the lives of citizens and businesses. A potential new metric can be found in one of the first Executive Orders

issued by President Trump. Executive Order 13771 stipulates that “for every new regulation issued, at least two prior regulations (must) be identified for elimination.”⁶⁰

Since a regulation is by definition intrusive (i.e., it has the force of law over the conduct of regulatees), the 2-for-1 process may be intended, over time, to have the practical effect of reducing the number of regulatory intrusions into the lives of citizens and businesses. The 2-for-1 process will presumably encourage regulators to find undesirable existing regulations to eliminate, in order to facilitate issuance of favored new regulations.⁶¹

For the first time in history, the federal government has begun to count national acts of deregulation as well as acts of regulation, and report their ratio each year to the public. At the end of Fiscal Year 2017, the administration reported that it had accomplished 22 acts of deregulation for every one act of regulation. Specifically, there were 67 deregulatory actions and 3 regulatory actions.⁶²

There are concerns that the 67 figure includes some questionable entrees, and thus some analysts contend that Trump’s first-year deregulatory effort does not amount to much.⁶³ About one-third of the 67 deregulatory actions are not uniquely attributable to the Trump administration since they were already being discarded by the Obama administration. Some of the entrees are simply extensions of effective dates, not repeals or modifications that reduce burden or intrusion. One of the 67 may have been miscoded, as it contained both regulatory and deregulatory provisions. Specifically, while the Department of Labor did raise the cap on the number of immigrants who are permitted to take certain seasonal, non-agricultural jobs, the action also included more complicated procedures for businesses trying to hire an immigrant.⁶⁴ Many of the 67 deregulatory actions were not supported by quantitative estimates of both cost savings and foregone benefits, as two-thirds were deemed to be non-significant actions. Thus, the importance of the counted deregulatory actions is an issue.

55 On Justice Gorsuch, see George Will. Gorsuch Strikes a Blow Against the Administrative State. *National Review*. April 22, 2018; on Kavanaugh, see Robert Barnes, Steven Mufson. White House Counts on Kavanaugh in Battle Against ‘Administrative State.’ *Washington Post*. August 12, 2018.

56 OIRA. “Introduction to the Fall 2018 Regulatory Plan.” Available at <https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201810/VPStatement.pdf>.

57 See, for example, Keith E. Whittington, Jason Iuliano. The Myth of the Nondelegation Doctrine. *University of Pennsylvania Law Review*. 165. 2017, 379-431; Eric A. Posner, Adrian Vermeule. Interring the Nondelegation Doctrine. *University of Chicago Law Review*. 69(4). Autumn 2002, 1721-1762.

58 Cass R. Sunstein. The American Nondelegation Doctrine. *George Washington Law Review*. 86. 2018, 1181-1208.

59 See discussion in Sean Reilly. Wood-Heating Proposal Tests Rule-Busting Claims. *Energy and Environment News*. December 14, 2018; on the influence of welfare economics in the George W. Bush administration, see John D. Graham. Saving Lives through Administrative Law and Economics. *University of Pennsylvania Law Review*. 157(2). 2008, 395, 456-482.

60 Executive Order 13771 – Reducing Regulation and Controlling Regulatory Costs. January 30, 2017.

61 OIRA. Introduction to the Fall 2018 Regulatory Plan. 2018, p. 2. Available at <https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201810/VPStatement.pdf>.

62 OIRA. Regulatory Reform: Completed Actions Fiscal Year 2017. 2017. https://www.reginfo.gov/public/pdf/eo13771/FINAL_BU_20171207.pdf.

63 Cary Coglianese. Let’s Be Real about Trump’s First Year in Regulation. *The Regulatory Review*. Penn Program on Regulation. January 29, 2018; Alan Levin, Ari Natter. Trump Stretches Meaning of Deregulation in Touting Achievements. *Bloomberg.com*. December 29, 2017; Jennifer Rubin. The President and the Deregulation Myth. *Washington Post*. January 31, 2018.

64 Department of Homeland Security. Exercise of Time-Limited Authority to Increase the Fiscal Year 2018 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program. 83 *Federal Register*. May 31, 2018, 24905-24919.

Nor is the 22-to-1 ratio reported by OIRA an apples-to-apples comparison. Acts of deregulation are defined liberally by OIRA to include non-significant regulations, significant regulations, economically-significant regulations, guidance documents, paperwork requirements, and even avoidance of planned regulations. Acts of regulation are defined more narrowly to encompass only promulgation of significant new regulations.

In our interviews with regulatory experts across the political spectrum, skepticism was expressed as to whether this approach to computing the ratio is intellectually defensible. If OIRA is to continue the practice of reporting the aggregated ratios of deregulatory to regulatory actions, the practice should be modified to ensure apples-to-apples comparisons.

OIRA appears to be moving in this direction. The administration's second public report about deregulation reports 176 deregulatory actions in FY 2018, up from 67 in FY 2017. For FYs 2017 and 2018 combined, OIRA includes an apples-to-apples comparison of the ratio of significant deregulatory actions to significant regulatory actions, where the same type of actions ("significant" ones) are counted on both sides of the ledger. With this symmetric accounting, the Trump administration has (so far) engaged in 90 significant deregulatory actions but only 17 significant regulatory actions, a ratio of more than five to one.⁶⁵

It remains difficult to assess the importance of the second-year deregulatory actions. Some are simply delays in effective dates while many are not accompanied by any numerical estimates of cost savings or foregone benefits.⁶⁶

5.0 MEASURING CHANGES IN FREEDOM

Other probing questions are asked about OIRA's new accounting practice. Are all acts of regulation equally intrusive? Are all acts of deregulation equally liberating? Unless the answers to the two questions are yes, the ratios being reported to the public can be misleading as to whether

the overall body of federal regulations is becoming more or less intrusive over time. It certainly would seem dubious to allow repeal of two slightly intrusive regulations to be considered equivalent to the addition of one highly coercive regulation.

New tools are needed to assist OIRA and the agencies in the measurement of changes in freedom. From a philosophical perspective, OIRA guidance needs to start by addressing some core definitional questions such as whether only violations of "negative freedom" are to be considered or whether violations of "positive freedom" also count.

The philosopher Isaiah Berlin is credited with distinguishing the two types of liberty.⁶⁷ Negative liberty is freedom from external constraints on one's actions. Regulation is an external constraint, and external constraints imposed by government

are of particular concern to libertarians and small-government conservatives. The more philosophical writings of the economists Friedrich Hayek and Milton Friedman are in this tradition.⁶⁸ Well-known small-government conservatives were represented on the Trump transition teams and appointed to some key posts at regulatory agencies.⁶⁹

Positive liberty is the possession of the capacity to act upon one's free will. That internal capacity can be

impaired by external factors such as poverty, poor education, language difficulties, lack of health insurance, racial or sexual discrimination and other adverse social and economic conditions. Berlin emphasizes that compromises on negative liberty may be required to ensure that individuals enjoy positive liberty. Harvard philosopher John Rawls, though he does not emphasize the term positive liberty, highlights, as a paramount value, the importance of each individual having access to the essential requirements to pursue the good life.⁷⁰

Once liberty is defined appropriately by a particular administration, and this definition can be expected to vary somewhat depending on presidential philosophy, there are measurement issues. A ban may be more intrusive than a tax, since the consumer may still purchase a taxed product, if they can afford it. A nudge, such as a mandatory warning label is less intrusive than a performance standard that prohibits

“With this symmetric accounting, the Trump administration has (so far) engaged in 90 significant deregulatory actions but only 17 significant regulatory actions, a ratio of more than five to one.”

65 OIRA. Regulatory Reform and Executive Order 13771: Final Accounting for Fiscal Year 2018. 2018.

66 Stuart Shapiro. Deregulatory Realities and Illusions. Opinion. The Regulatory Review. Penn Program on Regulation. November 12, 2018, <https://www.theregreview.org/2018/11/12/shapiro-deregulatory-real...>

67 Isaiah Berlin. Two Concepts of Liberty. Clarendon Press. 1958 (transcript of lecture delivered at Oxford on October 31, 1958).

68 Friedrich A Hayek. The Road to Serfdom. University of Chicago Press. 1944; Milton Friedman. Capitalism and Freedom. University of Chicago Press. 1962.

69 See for example the footprint of the Heritage Foundation in the Trump administration. Jonathan Mahler. How One Conservative Think Tank is Stocking Trump's Government. New York Times. June 20, 2018. Also see Evan Osnos. Trump vs the "Deep State." New Yorker. May 14, 2018 and Richard Mark Kirkner. It's Team Trump, But the Players Are From Think Tanks, Many with Koch Brother Roots. Managed Care. September 30, 2018.

70 John Rawls. A Theory of Justice. Revised Edition. Harvard University Press. 1999, 176-180.

products that do not meet the performance standard.⁷¹ Requiring a company to comply with a performance standard may be less intrusive than requiring the company to comply with a prescriptive design standard.⁷²

The issue is not simply how much intrusion a specific regulation imposes on a regulatee, though that is important; one must also consider how many regulatees in the country experience intrusion due to a specific regulation. Weighting each regulation by the severity of the intrusion and the number of people intruded upon would seem to be a more informative direction for regulatory analysis than simply counting the number of regulatory versus deregulatory actions. If the same regulation increases the freedom of some individuals while reducing the freedom of others, then a construct such as net freedom may be required.

6.0 IS IT REGULATION OR DEREGULATION?

The practice of coding each rulemaking as regulatory or deregulatory is not new, as OIRA has done such coding for decades. The coding has not been important until the Trump administration because the data were not used by policy makers and because acts of deregulation were relatively rare.

Distinguishing regulation from deregulation is not as straightforward as it may seem at first blush. The same rulemaking can appear to be regulatory or deregulatory, depending on the baseline for comparison.

Consider the Environmental Protection Agency's (EPA) Clean Power Plan (CPP), which covers electric-utility carbon pollution and was issued by the Obama administration in 2015. The CPP was stayed on February 9, 2016 by the US Supreme Court in a 5 to 4 decision. The stay occurred a few days before Justice Antonin Scalia passed away and before President Trump was inaugurated president.⁷³ After some delay for consideration, the Trump EPA decided to repeal the CPP and propose a more limited replacement rule called the Affordable Clean Energy (ACE) rule.

On the one hand, CPP provided more compliance options than ACE, including the option of planting trees outside of the fence-line of the plant, so ACE might seem to be more

restrictive, since it does not allow off-site measures. On the other hand, the GHG reductions required by CPP were much more stringent than ACE, and thus the CPP would generally be seen as more restrictive by the regulated industry.

Compared to no regulation, the proposed ACE is a regulatory action, as it imposes restrictions and costs on coal-fired power production. Compared to the Obama's CPP, ACE is arguably deregulatory, since it is less stringent in its GHG-reduction requirements than the CPP. OIRA and EPA chose to code this as two actions: The rule withdrawing CPP was coded as deregulatory while the proposed ACE was coded as regulatory.

Another complication concerns an agency rulemaking that has both deregulatory and regulatory provisions. The Department of Labor's recent immigration rule (mentioned above) is a good illustration of such a complex rule. How should such a rulemaking be coded for purposes of OIRA's public communications and compliance with the 2-for-1 executive order? OIRA lacks the tools to answer this question in a credible way from a freedom perspective.

A related conundrum occurs when a federal regulatory action preempts regulation by state and local authorities. Congress recently modernized the Toxic Substances Control Act for the first time since 1976 and included a limited federal preemption provision to restrain state and local regulators. Some chemical companies may favor EPA regulation of their chemical products because the presence of federal regulation will have the legal or practical effect of avoiding intrusive and conflicting state and local regulations. Compared to no regulation, an EPA regulation of a chemical substance is difficult to see as deregulatory. But, if a federal regulation bars or discourages a proliferation of conflicting state and local regulations, the federal regulation might reasonably be considered deregulatory. OIRA does not currently have data or tools to handle this complication in a freedom-oriented analysis.

Sometimes there is also a complicated relationship between the presence of a federal standard for consumer products and the vulnerability of the producer to liability under common law. In some cases, the producer, when sued for product-related injuries, may use compliance with the federal standard as a full or partial defense against a liability lawsuit.⁷⁴ Thus,

71 On how nudges can enhance freedom, see Richard H Thaler, Cass R Sunstein. *Nudge: Improving Decisions about Health, Wealth and Happiness*. Yale University Press. 2008.

72 Stephen Breyer. *Regulation and Its Reform*. Harvard University Press. 1982, 105-106.

73 Adam Liptak, Coral Davenport. Supreme Court Deals Blow to Obama's Efforts to Regulate Coal Emissions. *New York Times*. February 9, 2016; Juliet Eilperin, Brady Dennis. Court Freezes Clean Power Plan Lawsuit, Signaling Likely End to Obama's Signature Climate Policy. *Washington Post*. April 28, 2017.

74 Efforts in the George W Bush administration to assert broad claims of preemption met with limited success. William W Buzbee (ed). *Preemption Choice: The Theory, Law, and Reality of Federalism's Core Question*. 2009; the general pattern is for courts not to accept regulatory-compliance defenses but some states have passed tort reform legislation that allow limited or full regulatory-compliance defenses, see David G Owen. *Special Defenses in Modern Products Liability Law*. *Missouri Law Review*. 70(1). Winter 2005, 12-23; on the politics of federal preemption of common law liability, see Thomas O McGarity. *The Preemption War: When Federal Bureaucracies Trump Local Juries*. Yale University Press. 2008, and Richard A Epstein, Michael S Greve (eds). *Federal*

while the federal standard is an intrusion on the producer's entrepreneurial freedom, in some unusual – but important – situations, it protects the producer from a different kind of intrusion under common law. On the other hand, the regulatory-compliance defense can be seen as limiting the freedom of the consumer who was allegedly injured by the product.

The Trump EPA has also issued four “framework rules” under the new TSCA that establish the processes to be used during implementation.⁷⁵ These rules define the scientific and administrative processes to be used when regulating chemicals under the new law. OIRA has sidestepped the coding issue for the framework rules by deciding that they are fully or partially exempt from the requirements of EO 13771.⁷⁶ One could argue that the framework rules are as important (at least economically and with respect to entrepreneurial freedom) as many of the regulatory or deregulatory actions included in the first-year 22-to-1 ratio. The fact that they are excluded from the highly-publicized ratio is a hint that the ratio may be misleading.

OIRA guidance suggests that a rulemaking will be designated regulatory (deregulatory) if its net costs are positive (negative).⁷⁷ OIRA has issued definitional guidance on “net costs.” However, this guidance weakens the role of freedom under the two-for-one executive order, since it classifies rules in terms of a monetary metric rather than impact on freedom.⁷⁸ Insofar as the two-for-one offsets system collapses into an economic system, it simply duplicates or overlaps with the regulatory budget (described below) and federal cost-benefit review (which has been in place since the Reagan administration).

The general point is that regulatory policy is a complex subject, and it may not be obvious whether a particular rulemaking should be considered an act of deregulation or an act of regulation. Two equally competent OIRA desk officers could read the same rulemaking package and code the action differently. OIRA has struggled with a similar sort of

subjectivity when decisions are made as to whether specific rulemakings are “significant” (and therefore justify OIRA review); it is a matter of professional judgement where honest disagreements can occur.

The more OIRA can do to supply principled guidance to the coding process, the more credible the aggregate deregulation/regulation ratios will be. At the present time, the two-for-one system seems to be trending toward another economic-evaluation scheme while the ratios being reported by OIRA do not seem to have a high degree of credibility. On the other hand, there is some consistency value in using the same definitions over time, so reported trends are meaningful.

Some economists have little patience for counting acts of regulation and deregulation because what they care about is the overall impact of regulation on public wellbeing (perhaps measured by costs and benefits) or on the economy as a whole (Gross Domestic Product, employment and so forth).⁷⁹ Indeed, some theorists believe that changes in freedom and equity could be incorporated into future cost-benefit analyses.⁸⁰ Trump administration officials appear to support tangible evaluations of regulatory proposals but they may give them less weight than some previous administrations because the administration's primary focus is freedom (primarily negative freedom).

Interestingly, the Trump administration's two-for-one initiative is already influencing other jurisdictions to move in this direction.⁸¹ The state of Virginia recently enacted a bipartisan two-for-one pilot project coupled with a legislative requirement that state agencies reduce the number of existing regulatory requirements by 25% at two state agencies (the primary focus is professional licensing requirements).⁸² Note that the Virginia initiative is defined in terms of the number of requirements, not the number of rules or the costs of requirements.⁸³ Some reform experts argue that the Trump two-for-one reform should focus more on reducing the number of existing requirements, building on the years of experience in British Columbia and the recent pilot experiment in Virginia.⁸⁴

Preemption: States' Powers, National Interests. AEI Press. Washington, DC. 2007.

75 Pat Rizzuto. EPA Details New Oversight of Chemicals in Three Final Rules. Bloomberg BNA. BNA.com. June 22, 2017.

76 EPA published the chemical prioritization process rule (RIN 2070-AK23) on July 20, 2017. Procedures for the Prioritization of Chemicals for Risk Evaluation under the Toxic Substances Control Act. 82 Fed. Reg. 33753-33764 (2017). The Risk Evaluation process rule (RIN 2070-AK20) was published on July 20, 2017. Procedures for Chemical Risk Evaluation under the Toxic Substances Control Act. 82 Fed. Reg. 33726-33753 (2017). The Inventory Rule (RIN 2070-AK24) was published on August 11, 2017. 82 Fed. Reg. 37520-37544 (2017).

77 Dominic Mancini. Guidance Implementing Executive Order 13771. OIRA. M-17-21. April 5, 2017.

78 Dominic Mancini. Guidance Implementing Executive Order 13771. OIRA. M-17-21. April 5, 2017, Q4 and Q36.

79 Joshua Linn, Alan J. Krupnick. Ninety-Six Regulatory Experts Express Concerns about Trump Administration Reforms. Resources for the Future. Blog Post. Rff.com. May 24, 2017.

80 See, for example, Matthew D. Adler. Well-Being and Fair Distribution: Beyond Cost-Benefit Analysis. Oxford University Press. New York, New York. 2012.

81 On international trends, see D. Trnka, Y. Thuerer. One-In, X-Out: Regulatory Offsetting in Selected OECD Countries. OECD Regulatory Policy Working Papers. No. 11. OECD Publishing. Paris. 2019.

82 Virginia Legislature. HB833, 2018. <https://lis.virginia.gov/cgi-bin/legp604.exe?181+ful+CHAP0444>.

83 James Broughel. How to Improve Trump's Regulatory Budget. Washington Examiner. October 31, 2018.

84 Laura Jones. Cutting Red Tape in Canada: A Regulatory Reform Model for the United States. Mercatus Center at George Mason University. Arlington, Virginia. November 2015.

Could Trump's two-for-one initiative be retained or even strengthened by a future administration? A Republican administration might do so. We have doubts, based on our interviews, as to whether the next Democratic administration would retain the two-for-one reform, in part because it distracts from the regulatory focus on improving public wellbeing, in part because it seems somewhat duplicative with other administrative processes, and in part because it may be seen as unhelpful by several core pro-regulation constituencies of the Democratic Party.

7.0 REGULATORY BUDGETING

Executive Order 13771 also calls for a new regulatory budgeting process to control the overall cost of each agency's regulations. Prior to the Trump administration, there was no annual cap on the additional cost burdens that an agency is allowed to impose on the U.S. economy. The idea was first suggested by the U.S. Commerce Department and incorporated into draft legislation by Democratic Senator Lloyd Bentsen of Texas in the 1970s, but Congress never warmed to the idea.⁸⁵

President Trump insists that there should be a cap, echoing the concerns of several officials who have extensive experience at OMB.⁸⁶ The logic goes as follows: Since there is an annual limit on the amount of public (taxpayer-funded) money that an agency can spend (defined as the agency's congressional appropriation for that fiscal year), there should also be an annual limit on the amount of non-federal money that an agency can force regulatees to spend. (Regulatees are typically businesses, non-profit organizations, and state and local governments). Without a regulatory cap on costs, agencies will shift more of the costs of their policy ambitions to regulatees, as they are less scrutinized than appropriations of public money.⁸⁷ Since Congress has neglected to set such limits on the agencies, the Trump administration decided to do so through an OMB-led budgeting process.⁸⁸

Skeptics counter that a regulatory budget is not necessary because OIRA already reviews each significant regulation under EO 12866 to ensure that benefits justify costs. A regulatory budget can worsen outcomes since benefits are not an explicit part of the process.⁸⁹ According to this view, no additional restraint on regulatory action is appropriate. Whether OIRA's cost-benefit review under EO 12866 is adequate depends on the quality of the benefit-cost analyses prepared by the agencies and the vigor of OIRA in reviewing the analyses and enforcing the "benefits-justify-costs" test under EO 12866.⁹⁰

For fiscal year 2017, the regulatory budgets of all agencies were set at net zero by presidential executive order. That means that an agency may not impose any new regulatory costs unless the agency identifies an equal magnitude of regulatory costs from existing rules that can be eliminated. In technical guidance from OIRA, agencies have been informed as to how costs will be defined in the agency's regulatory budget, exclusions as well as inclusions.⁹¹

For the last two fiscal years, the annual regulatory budgets have been set based on agency proposals and OMB review, similar to the way that the President's budget request to Congress for various agencies is prepared on a year-to-year basis. For each covered agency, the regulatory budgets for FYs 2018 and 2019 have been set at zero or less than zero. Within the executive branch, this is a strong signal that the Trump administration is serious about deregulation.

Some critics are concerned that the new regulatory budgeting process might cause agencies to eliminate good regulations that have large benefits relative to costs, in order to make room in the regulatory budget for promising new regulations.⁹² The theory of the regulatory budget suggests otherwise. Agencies would start by eliminating regulations with high ratios of cost to benefit, before eliminating regulations with high ratios of benefit to cost. The assumption here is that agencies care about the benefits of their regulations. Unfortunately, the process could become politicized, causing

85 Lawrence J White. *Reforming Regulation: Processes and Problems*. Prentice-Hall. 1981, 226-227.

86 Christopher C. DeMuth. *The Regulatory Budget*. Regulation. March/April 1980, 29; Robert E. Litan, William D. Nordhaus. *Reforming Federal Regulation*. Yale University Press. New Haven, Connecticut. 1983; John F. Morrall III. *Controlling Regulatory Costs: The Use of Regulatory Budgeting*. OECD. Paris, France. 1992.

87 On the "unappreciated synergy" between fiscal budgeting and regulatory budgeting, see Wayne Crews. *Ten Thousand Commandments: An Annual Snapshot of the Regulatory State*. 2018 Edition. 2018, 13.

88 Ted Gayer, Robert Litan, Philip Wallach. *Evaluating the Trump Administration's Regulatory Reform Program*. Brookings Institution. Washington, DC. October 2017.

89 Joshua Linn, Alan J Krupnick. *Ninety-Six Regulatory Experts Express Concerns about Trump Reforms*. Resources for the Future. Blog Post. Rff.com. May 24, 2017.

90 The technical quality of regulatory impact analyses in the federal government is highly uneven. Jerry Ellig, Patrick A McLaughlin. *The Quality and Use of Regulatory Analysis in 2008*. Risk Analysis. 32(5). 2012, 855-880; Winston Harrington, Lisa Heinzerling, Richard D Morgenstern (eds). *Reforming Regulatory Impact Analysis*. Resources for the Future. Washington, DC. April 2009.

91 OIRA. *Guidance Implementing Executive Order 13771, Titled "Reducing Regulation and Controlling Regulatory Costs"*, M-17-21, April 5, 2017.

92 James Goodwin. *The Key Ingredient in Trump's Anti-Reg Two-for-One Executive Order? Fuzzy Math*. Center for Progressive Reform. Blog Post. April 12, 2017; James Goodwin. *Trump White House: Safeguards Produce Huge Net Benefits; Also Trump White House: Repeal them Anyway*. Center for Progressive Reform. Blog Post. February 28, 2018.

some costly but high-benefit regulations to be eliminated if the benefits are spread diffusely among citizens or if benefits occur only in the distant future or if benefits accrue mostly to vulnerable groups in society that lack political clout.⁹³

A check on perverse outcomes due to the regulatory budget is the cost-benefit decision rule in the Executive Order 12866 that governs OIRA review, since deregulatory rulemakings must be supported by cost-savings that justify their foregone benefits.⁹⁴ Nonetheless, there is concern the Trump administration's focus on deregulation will compromise the legitimate role of benefits in future regulatory policy. A related concern is that the regulatory budget simply discourages agencies from even considering good new regulations (i.e., initiatives with benefits greater than costs) because of the new burden to eliminate inefficiencies from existing regulations.

A deeper problem is that some agencies have little knowledge of the actual benefits and costs of existing regulations, as the agencies often have not estimated benefits or costs since the regulations were enacted in the first place.⁹⁵ It is well known that pre-regulation estimates of costs and benefits are not always validated by retrospective evaluations, and the errors in prediction go in both directions.⁹⁶ Moreover, if one-time capital costs dominate a regulation's costs, repealing that regulation is not likely to save much capital, since those capital expenses are already sunk.⁹⁷ Unless it can be shown that there are numerous existing regulations that lack benefits to justify their continuing costs, then regulatory budgeting could force agencies to remove regulations that have benefits that justify their costs.⁹⁸

To make this process more meaningful, the Trump administration needs to institute a practical process of

retrospective evaluation of the costs and benefits of both existing and new regulations. The Bush 43 and Obama administrations took some modest steps in this direction but, given the huge body of existing regulation, there is a vast amount of unfinished business and it is not obvious how agencies should go about finding the bad regulations.

Executive Order 13777 calls for regulatory task forces to be assembled at agencies to address this question. This may be a step forward from the Bush 43 and Obama efforts, if the task forces bring more focus and energy to the relook at inherited regulations. Nonetheless, those task forces face the same daunting task that was faced by the agencies under the Bush and Obama administrations' regulatory look-back processes.⁹⁹ Those processes made only limited progress on a huge task, in part because the regulatees themselves often do not know the costs and/or benefits of the regulations that are applied to them. When regulatees nominate regulations for reform, they are often unable to supply relevant cost or benefit information. The cost of collecting such information is not trivial, and it is not clear who should bear that cost.¹⁰⁰

As a result, the regulatory budgeting process may have much less impact than proponents hoped for, but also much less impact than opponents feared.¹⁰¹ That is because the political appointees in the Trump Administration are not eager to adopt new regulations, especially ones that would impose additional costs on businesses, non-profit organizations, and state and local governments. Unless new regulations are envisioned, the regulatory budgeting process does not generate much incentive for agencies to seek out and find bad regulations that can be eliminated. Regulatory budgeting is more likely to have impact in a government such as the

“For each covered agency, the regulatory budgets for FYs 2018 and 2019 have been set at zero or less than zero. Within the executive branch, this is a strong signal that the Trump administration is serious about deregulation.”

- 93 Progressives have a long-standing concern that more influence of economics in regulatory processes will compromise public health, safety and environmental progress. See Thomas O. McGarity. *Freedom to Harm: The Lasting Legacy of the Laissez Faire Revival*. Yale University Press. New Haven, Connecticut. 2013.
- 94 OIRA. Guidance Implementing Executive Order 13771, Titled “Reducing Regulation and Controlling Regulatory Costs”, M-17-21, April 5, 2017; Marcus Peacock, Implementing a Two-for-One Regulatory Requirement in the United States, George Washington University Regulatory Studies Center, December 7, 2016.
- 95 An exception may be the National Highway Traffic Safety Administration, which has published retrospective assessments of the costs and safety benefits of each of the agency's major Federal Motor Vehicle Safety Standards. James F Simons. Cost and Weight Added by the Federal Motor Vehicle Safety Standards for Model Years 1968 to 2012 in Passenger Cars and Light Trucks. DOT HS 812 354. NHTSA. John D. Graham. Saving Lives through Administrative Law and Economics. University of Pennsylvania Law Review. 157. 2008, 395. 526. Washington, DC. 2017; Charles J Kahane. Lives Saved by Vehicle Safety Technologies and Associated Federal Motor Vehicle Safety Standards, 1960-2012. DOT HS 808 570. NHTSA. Washington, DC. January 2015.
- 96 Winston Harrington. Grading Estimates of Benefits and Costs of Federal Regulation: A Review of Reviews. Resources for the Future. Washington, DC. Discussion Paper No. 06-39. September 2006.
- 97 On the importance of identifying “sunk” costs in retrospective regulatory evaluation, see OMB Draft 2017 Report to Congress, p. 52.
- 98 Wiener and Ribeiro, 2016.
- 99 Executive Orders 13563 (Obama) and 13771 (Trump).
- 100 A good place to start might be billion-dollar regulations. John D. Graham. Saving Lives through Administrative Law and Economics. University of Pennsylvania Review. 157(2). 2008, 395, 528.
- 101 Keith B. Belton, Kerry Krutilla, John D. Graham. Regulatory Reform in the Trump Era. Public Administration Review. 77(5). September/October 2017, 643-644.

Blair administration in the United Kingdom, since Blair had substantial ambitions for new regulations but also recognized the need for some housekeeping with the existing body of UK regulations.¹⁰²

If a regulatory budget is set less than zero, then the agency is required to find some existing regulatory burdens that can be eliminated. But, the agencies are searching anyway because President Trump is separately instructing his Cabinet officers to find as many regulations as possible to eliminate, and Trump appointees have been carefully selected to ensure sympathy with deregulation. The proof will be in the pudding: the number of existing regulations eliminated or made less burdensome or less intrusive by the Trump administration.

Would a regulatory budget constrain the ambitions of a progressive, pro-regulation administration? Not necessarily. The budgets for agencies could be set relatively high, allowing plenty of room for ambitious new regulations. The key concern is that the additional administrative burden of a regulatory budget may not be seen as worth it in a future Democratic administration. Thus, the longevity of President Trump's regulatory-budgeting innovation is questionable.

102 For reviews of the UK and Canadian experiences with regulatory budgeting, see Sean Speer. *Regulatory Budgeting: Lessons from Canada*. R Street Policy Study No. 54. Washington, DC. 2016; Jeffrey A. Rosen, Brian Callahan. *The Regulatory Budget Revisited*. *Administrative Law Review*. 66(4). 2016, 835-860; Ted Gayer, Robert Litan, Philip Wallach. *Evaluating the Trump Administration's Regulatory Reform Program*. Brookings Institution. Washington, DC. October 2017; and Andrea Renda. *One Step Forward, Two Steps Back? The New U.S. Regulatory Budgeting Rules in Light of the International Experience*. *Journal of Benefit-Cost Analysis*. 8(3). Fall 2017, 291-304.

8.0 FINDINGS

We proceed to the findings of our two-year assessment of what President Trump has accomplished with respect to deregulation. We consider both the *flow* of new regulations and the *stock* of existing regulations.

Each rulemaking is classified by OIRA as non-significant, significant, or economically significant. An “economically significant” regulation (similar to the term “major” regulation) is projected at the time of promulgation to have at least a \$100 million impact on the economy or alter, in a material way, the economy or a sector of the economy.¹⁰³ The category “significant” regulations includes actions with such a large economic impact, but the category also includes those rules that have a significant budgetary impact, that create a serious inconsistency with the actions of another agency, or that raise novel legal or policy issues. The “non-significant” regulations (those rules that are neither significant nor economically significant) make up the largest share of rules. They are often considered minor or routine, but not necessarily by the regulatees who are impacted by them.

Please note that the time period we have studied has not been impacted much by the recent partial government shutdown. During the third year of the Trump administration, both the flow of new regulations and the pace of deregulatory rulemakings may have been impacted by the shutdown.¹⁰⁴

We also remind readers that some previous presidents (e.g., Ronald Reagan) were more inclined to regulate as they moved closer to their re-election or closer to the end of their second term. We are evaluating only Trump’s first two years in office, and it remains to be seen if the deregulatory emphasis continues throughout his presidency.

FINDING #1:

The flow of new regulations under the Donald Trump administration has been much smaller than observed during the Barack Obama and George W. Bush administrations.

There is strong evidence that the pace of new regulations has slowed compared to previous presidents. Table 1 reports the number of new regulations issued in the first 23 months of the

Trump administration, the Obama administration, and the George W. Bush administration.

As Table 1 shows, the total number of final regulations completed under the Trump administration is approximately 40% smaller than the number issued by the Bush administration and the Obama administration. The number of “significant” regulations under President Trump is almost 50% smaller than the number issued under Presidents Bush and Obama. For major rules, the counts under both Trump (-53%) and Bush (-41%) are substantially smaller than the count under Obama.

Comparing the total number of regulations is questionable because the category is dominated by the non-significant rules, a heterogeneous category that includes many minor routine rules that are updated periodically, rules that are necessary or helpful in the administration of budgetary programs (e.g., Medicare), and noncontroversial rules that do not have much intrusive or burdensome character. With regard to trends, the flow of non-significant rules may also be low in periods when Congress has been enacting few new legislative measures, since implementing regulations will also decline. More study is needed to determine why the Trump administration has issued so few non-significant rules.

Caution is also appropriate when comparing the number of significant regulations across administrations because the definition of “significant” is subjective and the determinations are often non-transparent. One study of 109 significant rules found that 75% of them included no language to explain why they were judged to be significant.¹⁰⁵ All that can really be said is that a significant regulation is one that OIRA decides it wants to review. More research is needed as to why the Trump administration’s significant-rule counts are so small.

OIRA also controls the determination of “economically significant” rules and there are examples where bureaucratic games have been played with how the \$100 million threshold is applied in specific rulemakings.¹⁰⁶ Nonetheless, the counts of major rules are more dependable for purposes of temporal comparisons because of the quantitative threshold and the well-accepted economic constructs that underpin the definition. Moreover, major rules are believed to account for most of the impact of federal regulation on the U.S. economy, since a small minority of federal regulations are believed to account for the bulk of total regulatory burdens

¹⁰³ The definitions of “economically significant” and “major” are quite similar and thus the terms are often used interchangeably, as they are in this report.

However, the term “major rule”, which is defined in the Congressional Review Act, is more expansive than the term “economically significant” rule because major rules also include rules that would have a significant adverse effect on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets. See 2017 Draft Report to Congress on the Costs and Benefits of Federal Regulation and Agency Compliance with the Unfunded Mandates Act. US Office of Management and Budget. 2017, 1.

¹⁰⁴ See “A Long Shutdown Hinders Trump’s De-regulation Efforts” by Bridget Dooling in The Hill, January 10, 2019.

¹⁰⁵ On the subjectivity and non-transparent nature of “significance” determinations, see General Accountability Office. Federal Rulemaking: Agencies Included Key Elements of Cost Benefit Analysis, But Explanations of Regulations’ Significance Could be More Transparent. Washington, DC. 2014.

¹⁰⁶ Nina A Mendelson, Jonathan B Wiener. Responding to Agency Avoidance of OIRA. Harvard Journal of Law and Public Policy. 37. 2014, 447-521.

and benefits.¹⁰⁷ This pattern helps explain why OMB's annual report to Congress on the costs and benefits of federal regulation focuses primarily on major rules.¹⁰⁸ But, even the economically significant rules include a substantial fraction (36% in FY 2016) that do not impose net costs. Instead, they transfer income within society to implement budgetary programs authorized by Congress such as Medicare and the Pell grants for student aid.¹⁰⁹

Since the \$100 million threshold is not adjusted for inflation, one might have expected President Trump to have adopted more major rules than Presidents Obama and Bush, since the threshold – in real terms – is declining over time, thereby making it easier for a rule to qualify as major. In fact, President Trump issued fewer major rules in his first 23 months in office than did his two predecessors. The stark difference between the Trump and Obama administrations is perhaps not surprising as the Obama administration set a record for issuing the greatest number of impactful rules.¹¹⁰

The final columns in Table 1 refer to regulatory and deregulatory actions under EO 13771, and recall that those terms are applicable only to the Trump administration. Few new regulatory actions have been issued that are subject to the “Two for One” policy. Notable is the difference between the number of Trump significant regulations and the number of regulatory actions subject to EO 13771. The smaller number reflects the limited scope of the two-for-one order as OMB/OIRA restricted coverage to exclude transfer rules, financial rules, budgetary rules, rules from independent agencies and other specialized cases.

There are two recent studies that examined regulatory activity under Trump in more detail, adjusting for some of the data deficiencies described here. Both studies come to the same conclusion: the flow of new regulations is much smaller under Trump than under Obama and Bush.¹¹¹

The Trump administration does not always oppose new regulations. President Trump's trade policies have made extensive use of regulatory power (e.g., the new US trade agreement with Mexico and Canada compels greater use of auto parts that are made in the United States). Trump's immigration policies use regulatory power to restrict the flow of new immigrants and prosecute apprehended immigrants. The Food and Drug Administration is “bucking the Trump administration's push for deregulation” by launching pro-regulation initiatives on drug prices, e-cigarettes and the opioid epidemic.¹¹² And USDA has finalized a rule compelling food manufacturers to alert US consumers to the presence of genetically modified ingredients.¹¹³

Some of the administration's pro-regulation initiatives can be traced to specific Trump campaign positions in 2016 (e.g., a US-first trade policy and crackdowns on illegal immigration). Others are due to statutory requirements from Congress (e.g., the new USDA labeling of bioengineered foods). But, some, such as FDA's regulatory activism, are hard to explain given the President's strong commitment to deregulation.

Why is the flow of new regulations so small under the Trump administration? The administration did propose large cuts in the budgets of regulatory agencies but, for the most part, the Republican-majority Congress did not grant those requests.¹¹⁴

We believe the most important factor may be the selection of people to serve in the Trump administration. The appointments made by President Trump to the federal regulatory agencies appear to have been made with a preference for those that share the president's commitment to deregulation.

Another underappreciated factor may be the number of unfilled leadership posts at regulatory agencies. An unusual feature of the Trump administration is that the White House has been relatively slow to nominate candidates

107 US Office of Management and Budget. 2006 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities. Washington, DC. 2006, 14 (major rules are believed to account for the “vast majority” of the total costs and benefits of federal rulemaking).

108 See 2017 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act. US Office of Management and Budget. Washington, DC. 2017, p.6.

109 2017 Draft Report, 2.

110 On the Obama administration's record rate of producing major new regulations, see Sam Batkins. 600 Major Regulations. Insight. August 6, 2016. American action forum.org. One contributing factor to the large number of major rules in the first two years of the Obama administration is that the Bush EPA was slow to respond to some statutory and judicial deadlines, and some of Bush's major rules were remanded by courts late in Bush's second term. The judicial remands of those major rules had to be dealt with by the incoming Obama EPA. On Bush's loss of key rules in federal court decisions, see John D. Graham. Bush on the Home Front: Domestic Policy Triumphs and Setbacks. Indiana University Press. 2010, 194-220.

111 Bridget C.E. Dooling. Trump Administration Picks Up the Regulatory Pace in its Second Year. Regulatory Studies Center. George Washington University. August 1, 2018; Connor Raso. Where and Why Has Agency Rulemaking Declined Under Trump? Brookings Institution. Washington, DC. June 29, 2018.

112 Emily Mullin. FDA Chief Pushed Hard on Public Health Issues. Chemical and Engineering News. December 3, 2018, 33; Stephanie Armour, Joseph Walker. Trump Administration Moves to Curb Drug Rebates in Medicare, Medicaid. Wall Street Journal. February 1, 2019. A2.

113 Cheryl Hogue. US Required Labeling of GMO Foods as ‘Bioengineered.’ Chemical and Engineering News. January 7, 2019, 15.

114 There has been a large exodus of experienced personnel from the US Environmental Protection Agency during the Trump administration, and this trend could account for some of the decline in rulemaking activity by EPA. It does not appear to be budget-related. Senior career staff may be departing because they sense that there will be little meaningful regulation to protect the environment during the Trump administration. Lisa Friedman, Marina Afio, Derek Kravitz. EPA Officials, Disheartened by Agency's Direction, Are Leaving in Droves. New York Times. December 22, 2017.

for top regulatory posts while the Republican-majority Senate has been relatively slow to process and approve the President's nominations.

The absence of a Senate-confirmed Trump nominee does not make it easy for a department or agency to issue new regulations. In fact, the career staff of a leaderless regulatory unit may simply be told that there will be no new regulations (including new deregulations) considered until the administration has appointed leadership to the unit. The longer the appointment delay, which is often exacerbated by delays in the Senate confirmation process, the fewer may be the number of new regulations coming from the leaderless unit. Thus, the pace of new regulations under Trump may be slow in part because the White House was slow in putting the Trump team into place.

To explore this phenomenon numerically, we define the total appointment time as the sum of the time it takes President Trump to make a nomination for a regulatory post plus the time it takes for the Senate to confirm the nomination. Both the nomination and confirmation schedules are addressed below.

Figures 1 and 2 compare nomination and confirmation schedules for the top regulatory officials in the Trump administration to the comparable schedules for officials in the George W. Bush administration. We did not use the Obama administration as the comparator because there may be differences between the two political parties in how much priority is given to particular posts.

To identify the top regulatory posts, we examined regulatory activity over the last ten years as summarized in OMB's annual reports to Congress on the costs and benefits of federal

regulation.¹¹⁵ There were nine regulatory units associated with five or more major rules, and those nine regulatory posts are included in the figures. Figure 1 compares the time from inauguration to nomination for these nine key positions. Figure 2 compares the time taken by the Senate to confirm these individuals.

There are two important caveats to make about the figures. President Trump has yet to nominate a leader of the Federal Aviation Administration. He did appoint an acting administrator who has been in place since January 7, 2018. The nomination time is set provisionally in our calculation at January 19, 2019. Two of the Trump Administration nominees are still awaiting confirmation: EPA's Office of Solid Waste and Emergency Response and the Labor Department's Occupational Safety and Health Administration. The confirmation time for these individuals is also set at January 19, 2019.

With these points in mind, the figures show a clear pattern: President Trump is taking much longer to fill key regulatory posts than the last Republican President, George W. Bush. Both the nomination times and confirmation times are noticeably higher under President Trump, except Bush took much longer to nominate his Commissioner of the Food and Drug Administration. Part of the responsibility lies with the Trump Administration, but part also lies with the Senate, which is moving slower to confirm Trump nominees than it did under President Bush.¹¹⁶

One might have expected the total appointment time to be particularly slow under Bush for several reasons: (1) the administration was slow to form because of the closeness of the race (Bush's slim 4-vote margin over Vice President Gore in the Electoral College, coupled with the Florida recount

Table 1. New Rulemakings During a President's First 23 Months.¹

President	Total Regulations	Significant Regulations	Major Regulations	Regulatory Actions under EO 13771*	De-regulatory Actions under EO 13771*
G.W. Bush	6,841	1,852	102	NA	NA
Obama	6,678	1,894	173	NA	NA
Trump	4,132	977	81	17	243

Sources: US GAO Federal Rule Database and the White House Office of Management and Budget (OMB).

¹ For each administration listed, the numbers refer to rules published in the Federal Register from Inauguration Day (January 20th) through December 31st of the following year. Rules from both independent and cabinet agencies are included. The GAO Federal Rule Database was accessed 1/19/19. *Covers the time period from 1/20/17 through 9/30/18.

¹¹⁵ Office of Information and Regulatory Affairs, 2018. *2017 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded mandates Reform Act*, Office of Management and Budget.

¹¹⁶ For a broader study that includes all government posts (without a focus on regulatory posts) and includes several previous administrations, see Ann Joseph O'Connell. *After One Year in Office, Trump's Behind on Staffing but Making Steady Progress*. Series on Regulatory Process and Perspective, Center on Regulation and Markets. Brookings Institution. Washington, DC. January 23, 2018.

controversy and the U.S. Supreme Court decision against a recount, which did not occur until December 2000), (2) the Senate rules typically required 60 votes to confirm a contested Bush nominee to a regulatory post, and (3) the Democratic Party had a working majority for most of Bush's first term (since the slight GOP majority was lost in March 2001 when Senator James Jeffords of Vermont switched from the Republican Party to the Democratic Party). In contrast, Trump's victory in the Electoral College was decisive, executive nominees could be confirmed with a simple majority of the Senate, and the Republican Party had a (slim) majority in the Senate. It is therefore striking that Bush filled the top regulatory posts much more quickly than Trump.

From our interviews, we gleaned that a conflict between the Senate Majority and Senate Minority Leaders could help explain why the nomination and confirmation intervals have been especially slow for the Trump administration. The Senate Minority Leader is requesting floor time and roll-call votes (i.e., few voice votes) for an unusually large number of judicial and executive nominations, more than the Majority Leader believes are necessary.¹¹⁷ As a result, the Majority Leader is giving higher priority to judicial than executive nominations in the allocation of precious floor time, and the Trump administration has responded by placing key staff at regulatory agencies in acting positions, without a formal nomination or Senate confirmation. In some cases, Trump-appointed staff are virtually running regulatory offices without a Senate confirmation because the Senate confirmation process is seen as dysfunctional.

Personnel policies are certainly not the only factor slowing the pace of new regulations. President Trump has publicly and explicitly stated that his administration is trying to slow the pace of new regulations. Career staff at the agencies respond to presidential signaling.¹¹⁸ The 2-for-1 executive order also adds a new hurdle in the path of a regulator seeking to issue a new regulation, since the regulator must identify at least two regulations that can be rescinded. Moreover, the new regulatory budgets for agencies have generally been set at zero or below zero, which means that regulators are not permitted to issue costly regulations unless they can find costly regulations to rescind. The White House has also focused agency staff on review and reconsideration of numerous regulations issued late in the Obama Administration. The staff time devoted to those reconsiderations is time that is not available to devise new regulations.

In summary, we have not been able to discern the relative importance of the various explanations for the slowdown in new regulations. More study should be undertaken to understand why the slowdown in the flow of new regulations has been so pronounced.

FINDING #2:

The Trump administration has been somewhat effective working with Congress on legislative acts of deregulation.

The Trump administration worked with the Republican-majority House and Senate to deregulate through legislative actions. The tools included resolutions of disapproval of recent rules under the Congressional Review Act (CRA) and deregulatory provisions inserted as part of newly enacted legislation. We now examine each in turn.

CRA DISAPPROVALS

The CRA, enacted in 1996, allows Congress, under expedited procedures, to “disapprove” a regulation within 60 legislative days of being issued, and provided that the President concurs. Once such a disapproval occurs, the issuing agency is not permitted to issue a rule in substantially the same form.¹¹⁹ The CRA is sometimes framed as a constrained version of the old legislative veto, which was nullified in 1983 when the U.S. Supreme Court ruled it to be unconstitutional.¹²⁰

Until President Trump took office, the CRA had been used to overturn only one regulation since the law's 1996 inception.¹²¹ OSHA's ambitious ergonomics-safety regulation, which was issued late in the Clinton administration, was disapproved in early 2001 by a Republican Congress, with the support of President Bush.¹²² The CRA is unlikely to be used when the President leads a different party than the one controlling the Congress, since the President can veto disapproval resolutions and a two-thirds vote is required to override a veto.

The election of 2016 allowed the Republican Party to control the White House and both chambers of Congress at the same time. The Republicans were eager to reverse what they saw as excessive regulation by the Obama administration.

The Republican Congress promptly “dusted off” the seldom-used CRA and sought to apply it in an aggressive manner. Many important and controversial rules were finalized late in the Obama administration. According to the U.S.

117 On the priority given to judicial nominations, see Sean Sullivan, Mike DeBonis. With Little Fanfare, Trump and McConnell Reshape the Nation's Circuit Court. *Washington Post*. August 14, 2018.

118 See generally C. Provost, P. Teske. (eds). *President George W. Bush's Influence Over Bureaucracy and Policy*. Palgrave MacMillan. 2009.

119 On the complexities of the “substantially similar” standard, see Adam M Finkel, Jason W Sullivan. A Cost-Benefit Interpretation of the “Substantially Similar” Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word (Ergonomics) Again? *Administrative Law Review*. 63. 2011, 707.

120 *Immigration and Naturalization Service vs. Chadha*. 46 U.S. 919 (1983).

121 There have been 10 Congresses since the CRA was enacted. Only three have had unified party control of both chambers of Congress and the White House.

122 Cornelius M. Kerwin. *Rulemaking: How Government Agencies Write Law and Make Policy*. CQ Press. Washington, DC. 2003, 223-4.

Congressional Research Service, there were 96 major rules and 1,936 total rules eligible for CRA disapproval.¹²³

Between February 14, 2017 and May 21, 2017, 16 resolutions of disapproval were passed by both chambers and signed into law by President Trump. Many other resolutions of disapproval, although introduced, failed to garner bicameral support for various reasons, including the fact that Senate floor time is a scarce resource and the CRA “clock” allows only a limited period of time for disapproval actions to be passed by the Congress. Perhaps more importantly, Republican members of Congress found it easier to condemn regulation as an abstract concept than it was to vote for repeal of specific regulations, even those adopted by the Obama administration.

One can question the economic importance of the sixteen CRA disapprovals, as none of them approach the potential economic impact of the multi-billion dollar OSHA ergonomics rule that was repealed by Congress in 2000.¹²⁴ Several of them were enacted without quantitative estimates of benefits and costs because that form of analysis is required only for major (economically significant) regulations. Nonetheless, each of the repealed regulations was of significant concern to stakeholders as they would have had meaningful impact within their policy domain.

Most of the disapproved actions were final regulations but one was a guidance document issued by the Consumer Financial Protection Bureau (CFPB). Legal scholars had debated whether the CRA covers guidance documents and, if so, whether including guidance documents would have any significant practical impact. In this case, the Government Accountability Office made the determination that the CFPB guidance document was covered, thereby expanding the potential reach of the CRA beyond what some experts envisioned.¹²⁵

The Trump administration had good reason to favor use of the CRA tool. Compared to a deregulatory rulemaking, a CRA disapproval resolution is faster and more definitive. No analysis or public comment is required to support a CRA disapproval resolution. Rulemaking entails a formal proposal, numerous supporting analyses, a public-comment period, interagency review within the executive branch and, once issued, risk of judicial reversal.¹²⁶

There is no question that the Trump administration encouraged CRA disapprovals. In fact, in its guidance to regulatory agencies on implementation of EO 13771, OMB/OIRA indicated that CRA disapprovals would be considered de-regulatory actions for accounting purposes under the new two-for-one system and under regulatory budgeting. This is somewhat surprising since the disapprovals are actions by the Congress, not the sponsoring agencies.

The Trump administration’s experience with the CRA, though it was not used as frequently as the administration might have preferred, was somewhat effective. Specifically, with Trump’s support, it was demonstrated that CRA is a powerful deregulatory tool in situations where the White House and Congress are newly controlled by the same party, and especially when control shifts from Democrat to Republican and after a Democratic president issued numerous recent regulations.

In the future, the CRA could be used by a Democratic Congress and an incoming Democratic President to repeal deregulatory actions by an outgoing GOP President. President Trump can reduce the risk of such repeals by finalizing his deregulatory rules well before the end of his first term (i.e., before May 2020). Likewise, when Trump deregulates in a two-step process, as he is doing with the EPA Clean Power Plan and ACE, it may not be feasible for Congress to use the CRA against the first step in the repeal-replace sequence.

DEREGULATION THROUGH DIRECT (NON-CRA) LEGISLATION

The Trump administration also worked with Congress on direct legislation to accomplish deregulation. Three pieces of legislation are worthy of mention.

First, the required number of votes were not mustered by the GOP leadership to repeal the entire Affordable Care Act (ACA). Congress did repeal, as part of tax reform, the penalty for violating the individual mandate in the ACA, the most unpopular provision of President Obama’s signature piece of domestic legislation.¹²⁷ Although this rescission is a classic step forward for the protection of negative liberty (as defined above), the weakened individual mandate complicates the development of a robust and affordable market for private health insurance in the US.

123 CRS determined that the 60 legislative days under the CRA corresponds to May 30, 2016, so any rule promulgated after that date was eligible for CRA disapproval. Carey Maeve, Christopher Davis, Caset Burgat. Memorandum using GAO Rules Database. US Congressional Research Service. Washington, DC. November 4, 2018.

124 Mike Allen. Bush Signs Repeal of Ergonomics Rules. Washington Post. March 21, 2001; U.S. Office of Management and Budget. 2006 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities. Washington, DC. 2006, 29 (repeal of OSHA ergonomics rule coded as saving \$4.8 billion per year).

125 The GAO decision memo is B-329129 and was issued on December 5, 2017.

126 Cornelius M Kerwin. Rulemaking: How Government Agencies Write Law and Make Policy. Third Edition. CQ Press. 2003.

127 John D. Graham. Obama on the Home Front: Domestic Policy Triumphs and Setbacks. Indiana University Press. 2016, 174-177.

Second, Congress passed modest deregulatory provisions in banking reform legislation. Many conservatives and the Trump administration might have preferred repeal of the entire Dodd-Frank law of 2010, but only modest deregulation – primarily for mid-sized banks -- was accomplished due to the need to find some bipartisan support for the deregulatory measure.¹²⁸

Finally, in an appropriations law covering the U.S. Department of Labor, Congress in March 2018 created a compromise to the controversy about how tips are allocated at restaurants. Beginning in 1966, Congress permitted restaurants to use tip pools or credits. A loophole in the Fair Labor Standards Act authorized employers to keep tips earned

Figure 1. Nomination Time (in days) of Key Regulators: Bush 43 vs. Trump

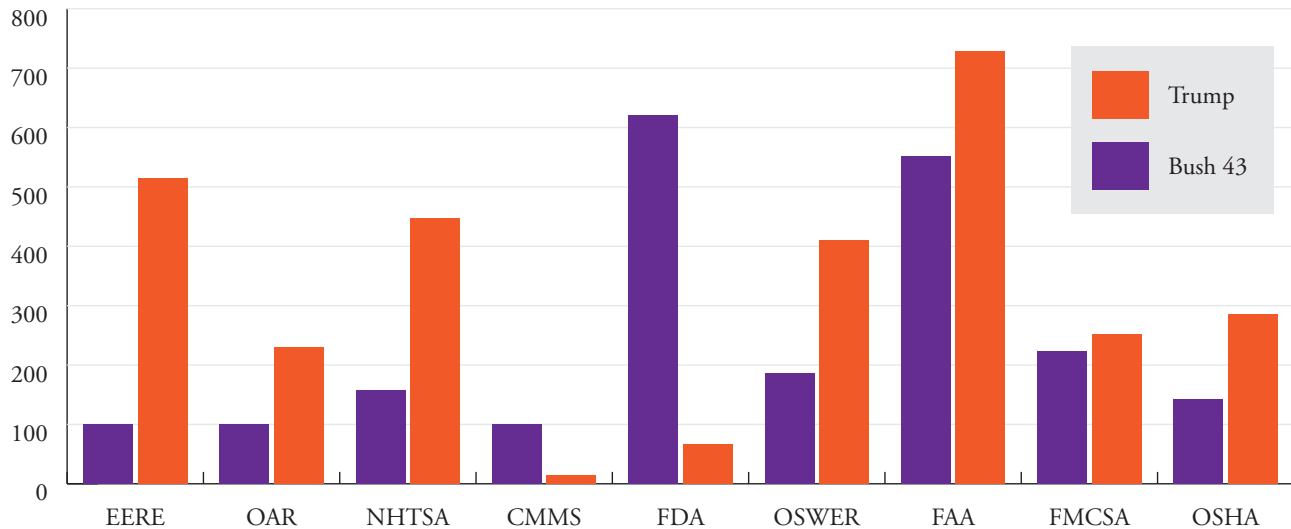
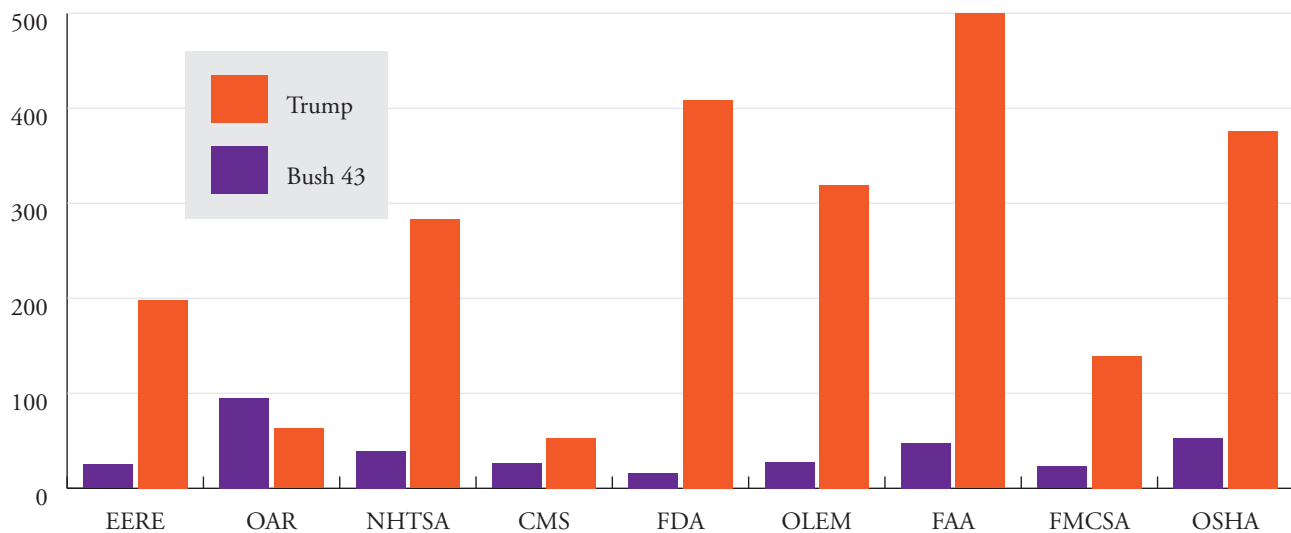


Figure 2. Confirmation Time (in days) of Key Regulators: Bush 43 vs. Trump



EERE = DOE Office of Energy Efficiency and Renewable Energy
 OAR = EPA Office of Air and Radiation
 NHTSA = DOT National Highway Traffic Safety Administration
 CMS = HHS Centers for Medicare & Medicaid Services
 FDA = HHS Food and Drug Administration

OLEM = EPA Office of Land and Emergency Management
 FAA = DOT Federal Aviation Administration
 FMCSA = DOT Federal Motor Carrier Safety Administration
 OSHA = DOL Occupational Safety and Health Administration

¹²⁸ Erik Sherman. Congress Just Approved a Bill to Dismantle Parts of the Dodd-Frank Banking Rule. NBCNews.com. May 23, 2018; Erik Sherman. Scaling Back Dodd-Frank Is Just the Beginning of Trump's Run on Deregulation. NBC.com. May 24, 2018.

by the employee, as long as the employee earned at least the full federal minimum wage. Most employers took advantage of the flexibility to raise the wages of other employees such as cooks and dishwashers but some owners simply reinvested the tips in their business or supplemented the pay of managers. In 2011 the Department of Labor issued a regulation stating that tips are the property of the employee and could be pooled only among employees who customarily receive tips. The Trump administration committed a procedural error during rulemaking (described later in this report) that contributed to a stakeholder-negotiated legislative solution. The new language from Congress explicitly prohibits employers (including managers and supervisors) from “keeping” tips but may allow employers who pay tipped employees the full federal minimum wage to create a tip pool that includes workers who do not regularly receive tips.¹²⁹

This legislative compromise, without judging its merits, is quite difficult to classify as to whether it is deregulation or regulation. It is also difficult to discern whether it increases or decreases freedom, since the liberties of the owners, managers and various employee classes need to be considered.

When the Congress and the White House collaborate on successful legislative activity, it is always arguable how much credit the White House deserves relative to leaders in Congress. What can be said for sure is that the Trump administration’s support was necessary for all of the CRA actions and for the three deregulatory laws documented here. A veto threat from the Trump White House would have killed each one of these efforts. Looking forward, the Democratic takeover of the House of Representatives in the 2018 elections

dims any near-term hope of deregulatory legislation or even modernization of the Administrative Procedure Act of 1946.¹³⁰

FINDING #3: Progress toward reviewing and removing the huge body of existing regulations has been slow, though there are some completed deregulatory rulemakings.

We are not aware of any published count of the total number of federal regulations on the books but it has to be at least in the hundreds of thousands.¹³¹ Table 2 reports the total number of rulemakings completed by the last three (pre-Trump) presidential administrations. The number of regulatory requirements is probably much larger since a rulemaking may contain more than one requirement.

Aggregating over the three administrations prior to Trump, the total flow of new regulations included 1,523 economically significant actions, 21,175 significant actions, and 68,846 non-significant actions. A substantial minority of the actions relate to the administration of federal expenditure programs (e.g., disbursements from entitlement programs) and thus do not necessarily impose intrusive requirements.

All of the regulatory actions counted in Table 2 are somewhere between two and eighteen years old. When a new regulation is adopted, an agency is not required by legislation to put in place a plan for retrospective evaluation of the regulation.¹³² Thus, some regulators lose interest in a regulation once it is adopted, unless there is an opportunity to build on the regulation with additional regulation.¹³³ Consequently, most of the actions in Table 2 have never been formally evaluated to determine whether they accomplished their objectives, what

Table 2. Rulemaking Under Recent Presidential Administrations.

Administration	Final Rules	Significant Rules	Major Rules
Obama	23,666	7,522	695
Bush 43	27,039	7,941	497
Clinton	18,141	5,712	331

Source: US GAO Rules Database. Accessed October 29, 2018. Rules include those from cabinet and independent agencies.

129 Jean Ohman Back, Schwabe, Williamson and Wyatt. Congress Paves the Way for Tip Pooling to Include Back-of-the-House Employees. April 12, 2018. [Schwabe.com](http://www.schwabe.com).

130 Christopher J Walker. Modernizing the Administrative Procedure Act. *Administrative Law Review*. 69(3). 2017, 629-670.

131 Since the federal government first began itemizing rules in the Federal Register in 1976, there have been 198,470 rules created. Clyde Wayne Crews, Jr. *Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*. 2018 Edition. Competitive Enterprise Institute. Washington, DC, 2018, 4.

132 The Administrative Conference of the United States has recommended adoption of a systematic process of retrospective review of agency rules. ACUS. Recommendation 2014-5 – Retrospective Review of Agency Rules. 79 Fed Reg. 75,114 (December 17, 2014).

133 At some regulatory programs, a phenomenon called “dynamic rulemaking” unfolds because of interest-group pressures to refine a rule, once it is adopted. Wendy Wagner, William West, Thomas McGarity, Lisa Peters. *Dynamic Rulemaking*. *New York University Law Review*. 92. April 2017, 183-266.

their actual benefits and costs were, or whether they had any unintended negative or positive side effects.¹³⁴

The career staff in the regulatory agencies, especially enforcement officials, may have informal knowledge on some of these look-back questions. Nonetheless, there is no federal website that the public can access that supplies the results of objective evaluations of each of these actions or even each of the economically significant ones.

All three presidential administrations prior to Trump undertook limited efforts at retrospective analysis of existing regulations to determine their effectiveness, costs and benefits. The number of existing regulations analyzed was typically in the dozens or hundreds rather than thousands.¹³⁵ One leading business organization reviewed such efforts and concluded that they “achieved relatively little.”¹³⁶ A major academic study focused on environmental regulation came to a similar conclusion.¹³⁷

Usually, the process of retrospective analysis involves an agency or OMB request for regulatees to nominate specific regulations that are no longer needed, that need to be modernized, or that can be made less burdensome, without sacrificing significant public benefits. The sponsoring agency and OIRA then review the nominations and decide what, if anything, should be done. When actions are taken, repeal is much less likely than refinement.¹³⁸

For regulations whose primary burdens are one-time capital expenses, the regulatees may not be motivated to request repeal or refinement, since the capital expenses are already sunk. Existing regulations that have ongoing costs are more

likely to be nominated. Moreover, recent regulatory actions are more likely to be nominated than old regulations, in part because the regulated community has become adjusted to old regulations and in part because relatively new regulations can still be in a frustrating stage of unpredictable interpretation, legal uncertainties, and costly implementation.

In his 2016 campaign pledges and his public statements while in office, President Trump envisioned a process where each Cabinet department would review each existing regulation and terminate each one that is no longer necessary.¹³⁹ President Bill Clinton made a similar public pledge after the Republicans seized a majority of House seats in 1995.¹⁴⁰ Interestingly, one of the best-kept secrets in Washington, DC is that Congress has already required a

retrospective review process for each federal regulation under the Regulatory Flexibility Act of 1980, at least for those regulations that impact small businesses.¹⁴¹ This provision of the RFA has not been implemented with any rigor, in part because the task would be enormous and in part because there is no penalty if an agency ignores the RFA.

In one prominent press conference that occurred about a year into his term, President Trump used a poster to show the explosive growth in federal regulation – measured as the number of pages in the *Code of Federal Regulations* – since 1960. President Trump indicated an intention to return the US to the 1960-level of federal regulation, a task even more ambitious than the RFA review provision. In reality, there is no evidence (yet) that the number of federal regulations (the stock of rules) under President Trump has declined; the best that can be said is that the rate of growth in federal

“Consequently most of the actions in Table 2 have never been formally evaluated to determine whether they accomplished their objectives, what their actual benefits and costs were, or whether they had any unintended negative or positive side effects.”

134 An exception is the National Highway Traffic Safety Administration (NHTSA) of the U.S. Department of Transportation. NHTSA has performed retrospective assessments of the costs and lifesaving benefits of each of its Federal Motor Vehicle Safety Standards. James F. Simons. *Cost and Weight Added by the Federal Motor Vehicle Safety Standards for Model Years 1968 to 2012 in Passenger Cars and Light Trucks*. DOT HS 812 354. NHTSA. Washington, DC. 2017; Charles J Kahane. *Lives Saved by Vehicle Safety Technologies and Associated Federal Motor Vehicle Safety Standards, 1960-2012*. DOT HS 808 570. 1997.

135 Wiener and Riberio, 2016; JE Aldy. *Learning from Experience: An Assessment of the Retrospective Reviews of Agency Rules and the Evidence for Improving the Design and Implementation of Regulatory Policy*. Report prepared for the Administrative Conference of the United States. Washington, DC. 2014, 27-36; SE Miller. *Learning from Experience: Retrospective Review of Regulations in 2014*. Regulatory Studies Center. George Washington University. 2014.

136 The Business Roundtable. *Comments on EPA Advance Notice of Proposed Rulemaking: Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process*. Docket ID No. EPA-HQ-OA-2018-0107. August 13, 2018, 6.

137 Jonathan B Wiener, Daniel L Ribeiro. *Environmental Regulation Going Retro: Learning Foresight from Hindsight*. *Journal of Land Use*. 32. Fall 2016, 1- 73.

138 Susan Dudley. *A Retrospective Review of Retrospective Review*. Regulatory Studies Center. George Washington University. May 7, 2013.

139 Remarks by the President on Deregulation. Roosevelt Room. White House. December 14, 2017 (Trump referred to “challenging my Cabinet to find and remove every single outdated, unlawful, and excessive regulation currently on the books.”)

140 William Jefferson Clinton. *Memorandum for Heads and Departments and Agencies: Regulatory Reinvention Initiative*, March 4, 1995 (“I direct you to conduct a page-by-page review of all your regulations now in force and eliminate or revise those that are outdated or otherwise in need of reform.”).

141 5 USC 610.

regulatory restrictions has declined a bit, which itself is somewhat noteworthy.¹⁴²

Like Congress in 1980 when it wrote the RFA and President Clinton in 1995 when he put Vice President Al Gore in charge of his Regulatory Reform Initiative,¹⁴³ the Trump Administration has not designed a practical process for performing the massive task of retrospective regulatory analysis. President Trump did issue Executive Order 13777, which calls for regulatory task forces to be established in each Cabinet agency. The task forces may be an enhancement over the Obama-era process, as the task forces may help focus agencies on finding undesirable regulations to eliminate or make less burdensome. Nonetheless, it is not apparent how the daunting challenge facing the task forces is any more tractable than the daunting challenge facing the political leadership and career civil servants in the regulatory agencies under the RFA.

The 2-for-1 executive order was intended to motivate agency staff to find undesirable regulations but the slow flow of new regulations provides relatively little incentive for staff to find undesirable regulations. Some of the task forces are using the same processes used in the last three administrations, which entails inviting the public to nominate existing regulations for reconsideration. We are not aware of any agency that is reviewing all of their existing regulations, one at a time, as candidate Trump pledged on the campaign trail.

In comparison to the huge volume of unanalyzed existing regulations, the number of completed Trump deregulatory actions is very small. The total for Fiscal Years 2017 and 2018 is 243 out of the 68,846 total regulations adopted in the last 24 years, as indicated in Table 2, if we accept the accuracy of the OIRA's "deregulatory" classifications. The vast majority of the 243 are not economically significant but they address a wide range of issues from exemptions for religious and moral

objections under the Affordable Care Act to streamlined approvals of liquefied natural gas (LNG) exports.¹⁴⁴

A more promising approach in the long run is for Congress or OMB to require that agencies plan for retrospective evaluation when a new regulation is adopted in the first place.¹⁴⁵ However, since the Trump administration is adopting few new regulations, the near-term impact of such a reform will be limited. More focus should be given to retrospective analysis of Trump's deregulatory measures, once they are adopted and implemented. There may be advantages in having that ex post evaluation research undertaken by independent third parties such as think tanks, academics and/or the Government Accountability Office and the National Research Council.¹⁴⁶

FINDING #4: **The Trump administration has underway 514 deregulatory rulemakings on a wide range of issues at different agencies.**

The Trump Administration's most recent *Regulatory Agenda* reports 514 deregulatory rulemakings are ongoing (i.e., "active").¹⁴⁷ This number is also small compared to the huge stock of existing regulations but larger than what the Reagan administration tackled over a similar time frame.¹⁴⁸ The fact that 26 are categorized as economically significant and 156 are categorized as significant is an indication that they may represent important changes to national policy.

The deregulatory ambitions of the Trump administration are particularly large in the environmental arena.¹⁴⁹ One set of deregulatory proposals seeks to simplify burdensome permitting processes for economic projects under the National Environmental Policy Act and the Endangered Species Act.¹⁵⁰ A second set seeks to ease costly pollution-control requirements on energy developers and producers, especially in the coal, oil and gas, and biofuels industries.¹⁵¹ A third

142 Patrick McLaughlin. Regulatory Data on Trump's First Year. Mercatus Center at George Mason University. January 30, 2018.

143 William Jefferson Clinton. Memorandum for Heads and Departments and Agencies: Regulatory Reinvention Initiative, March 4, 1995 ("I direct you to conduct a page-by-page review of all your regulations now in force and eliminate or revise those that are outdated or otherwise in need of reform."); Al Gore's Address on Regulatory Reform. Executive Office of the Vice President. February 21, 1995, govinfo.library.unt.edu, retrieved November 5, 2018.

144 The Fall 2018 Regulatory Agenda reports that 94 deregulatory actions were completed in the last year. Only 24 are coded as significant; 11 are coded as economically significant.

145 Maureen Cropper, Arthur Fraas, Richard Morgenstern. Looking Backward to Move Regulations Forward. *Science*. 355 (6332). March 31, 2017, 1375-1376; Richard Morgenstern. Retrospective Analysis of U.S. Federal Environmental Regulation. *Journal of Benefit-Cost Analysis*. 9(2). Summer 2018, 285-304; Maureen Cropper, Richard Morgenstern, Nicholas Rivers. Facilitating Retrospective Analysis of Environmental Regulations. *Review of Environmental Economics and Policy*. 12(2). August 2018, 359-370.

146 John D Graham. Saving Lives through Administrative Law and Economics. *University of Pennsylvania Law Review*. 157(2). 2008, 395. 527-528.

147 According to the Fall 2018 *Unified Agenda of Federal Regulatory and Deregulatory Actions*, (accessed on January 22, 2019) there are 514 active deregulatory rulemakings, of which 56 are significant and 26 are economically significant.

148 The Reagan Task Force on Regulatory Relief (1981-83) sponsored 119 reviews of "inherited rules." Presidential Task Force on Regulatory Relief: Reagan Administration Regulatory Achievements. Washington, D.C. August 11, 1983.

149 The Environmental Law Program at Harvard has developed a "Regulatory Rollback Tracker" that supplies basic information on each Trump administration effort to deregulate in the environmental arena. As of February 2, 2019, the list had 55 entrees. environment.law.harvard.edu. Also see Michael Greshko, Laura Parker, Brian Clark Howard, Daniel Stone. A Running List of How President Trump is Changing Environmental Policy. *National Geographic*. October 24, 2018.

150 Council on Environmental Quality. Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act. 83 Federal Register. June 29, 2018, 28591-28592. 83 FR 28591 (June 20, 2018).

151 For example, see 82 FR 61924 (December 29, 2017).

set is designed to limit future federal clean-water regulations that might adversely impact small businesses, construction, manufacturing and agriculture.¹⁵² Rulemakings related to climate change are addressed separately below.

Several of our interviewees believe that the Trump EPA's proposal to give states and localities more discretion about whether and how to regulate small waterways (rivers and streams near wetlands) could prove to be one of the most important rulemakings during President Trump's first term. The issue is complicated by recent court decisions and unresolved litigation against the "Waters of the US" rule issued by the Obama EPA in 2015.¹⁵³ The February 2017 proposal by the Trump EPA is also controversial because the supporting regulatory impact analysis discards a major category of benefits that was included in the original analysis supporting the 2015 rule.¹⁵⁴ Thus, once finalized, the Trump rule is likely to face complex litigation.

Finally, EPA has two process-oriented rulemakings underway, one related to the role of cost-benefit analysis in various EPA programs and the other on how to make the scientific data and analyses in EPA rulemakings more transparent for stakeholders and the public.¹⁵⁵ Both of these process rulemakings could be quite important but neither is strictly deregulatory in nature and both appear to be on a slow timetable for completion.¹⁵⁶ In fact, EPA's cost-benefit initiative began as an advance notice of proposed rulemaking with very limited depth.

The Trump administration's deregulatory rulemakings do not focus primarily or entirely on environmental matters. The wide topical range of deregulatory proposals now under consideration is noteworthy. The current version of the federal regulatory agenda lists 19 major deregulatory actions under development, of which four could be considered environmental (two from EPA and two from DOI).

Here is a sampling of the wide range of non-environmental proposed deregulatory actions underway various federal agencies:

“In comparison to the huge volume of unanalyzed existing regulations, the number of completed Trump deregulatory actions is very small.”

- **Department of Education (7/26/18)**: relaxation of student-loan forgiveness requirements for for-profit colleges and universities;
- **Department of Education (8/10/18 and 8/14/18)**: rescind gainful employment regulation of for-profit colleges and replace it with a consumer-information tool for students;
- **Department of Education (11/19/18)**: narrow the Title IX definition of sexual harassment, require school response only with actual knowledge of harassment (official report from accuser), expand rights for the accused to cross-examine their accuser through an adviser; and apply school responsibility only when harassment occurs within school's programs or activities;
- **Food and Drug Administration (11/19/18)**: clarify standards for exemption from informed consent during clinical trials when there are minimal risks

to participants and other safeguards for participants are present;

- **Department of Labor (11/15/18)**: allow 16-17 year olds to work in occupations that use patient lifts, as they entail less risk than forklifts and cranes;
- **Department of Transportation (9/10/18)**: relax work-hour limits on commercial motor vehicle drivers, especially where vehicle has a sleeper berth; and
- **Department of Agriculture (3/9/18)**: expand hiring flexibility for school nutrition program directors.
- **Veterans Administration (1/30/2019)**: allow veterans increased voluntary access to the private health care system.

Up-to-date information on the Trump administration's deregulatory agenda, summarized in readable form, is provided by the independent Center on Regulation and Markets at the Brookings Institution.¹⁵⁷

FINDING #5:

There are early signs that Trump's deregulatory agenda is being blocked or delayed by decisions in the federal judiciary.

The regulatory actions of each presidential administration are often litigated by parties that oppose the actions.

152 Heidi Vogt. EPA Chief Calls for Narrowing Scope of Clean-Water Rule. Wall Street Journal. December 11, 2018, A6.

153 On August 16, 2018, in South Carolina Coastal Conservation League v Pruitt, the U.S. District Court of South Carolina enjoined a 2018 rule adopted by the EPA and the US Army Corps of Engineers that sought to delay the implementation of WOTUS for two years. Previous federal court rulings have, in effect, stayed the effectiveness of the 2015 rule in 24 states while the 2015 rule remains in effect in 26 states. See American Bar Association, WOTUS and the Reach of CWA Jurisdiction, November 15, 2018, at https://www.americanbar.org/groups/environment_energy_resources/resources/wotus/

154 Kevin J. Boyle, Matthew J. Kotchen, V. Kerry Smith. Deciphering Dueling Analyses of Clean Water Regulations. Science. 358 (6359). October 6, 2017, 49-50.

155 EPA. Increasing Consistency and Transparency in Considering the Costs and Benefits in the Rulemaking Process. 83 Federal Register. June 13, 2018, 27524-27528; EPA. Strengthening Transparency in Regulatory Science. 83 Federal Register. April 30, 2018. 18768-18774.

156 See Ellen Knickmeyer, "EPA puts off final say on science transparency rule", Associated Press report at <https://www.apnews.com/2c12602deb6c4beab3d84b024c96ac7d> and See 83 FR 27524 (advanced notice of proposed rulemaking for cost-benefit rulemaking).

157 Brookings Institution. Tracking Deregulation in the Trump Era. Updated January 16, 2019. <https://www.brookings.edu/interactives/tracking-deregulation-in-the-Trump-era/>.

Federal judges strive to resolve each case based on the applicable law and the rulemaking record, regardless of partisan and ideological leanings. Nonetheless, for the last decade or so, evidence suggests that the federal judiciary is becoming more polarized on partisan and ideological lines, though not as severely as the Congress.¹⁵⁸

A majority of active federal judges (especially district-court judges) were appointed by Democratic presidents. See Table 3. Judges appointed by Republican presidents represent about half of federal appellate judges. The D.C. Circuit Court of Appeals, which hears a disproportionate share of administrative law cases, has three judges appointed by Republican presidents, seven judges appointed by Democratic presidents and one vacancy.¹⁵⁹ Thus, when the administration happens to draw a judge or panel of judges that is predisposed against the administration's position, the risk of judicial reversal is particularly high.¹⁶⁰

The Institute of Policy Integrity (IPI) of New York University School of Law is tracking litigation over President Trump's deregulation efforts. As of January 14, 2019, there were thirty (30) cases in the IPI database. Only two (2) cases were won by the Trump administration; 28 were won by plaintiffs (either by a formal court decision or because the federal government capitulated before a judicial decision was issued).¹⁶¹ There were 10 cases of capitulation and 18 cases where, from the government's perspective, adverse judicial verdicts occurred. None of the adverse decisions reached the U.S. Supreme Court, where justices appointed by Republican presidents hold a 5 to 4 majority. Some legal experts have observed that the Trump administration's loss rate in administrative

litigation appears much larger than the loss rate experienced by previous administrations.¹⁶²

We gathered information from *Wikipedia* on which president appointed each of the participating judges in the 18 judicial verdicts lost by the Trump administration. Thirteen (13) of the 18 decisions were made at the district level (single judges); five (5) were made at the appellate level (three-judge panels). Of the thirteen (13) single-judge decisions, ten (10) were made by judges appointed by Democratic presidents (seven by Obama); three (3) were made by judges appointed by Republican presidents. All five (5) of the three-judge panels were comprised of at least two judges appointed by Democratic presidents. In two cases the panel was unanimous and in two cases the panel was split, with both dissents written by judges appointed by Republican presidents. In the fifth case, only two judges participated in the opinion, as the third judge (Brett Kavanaugh) was being considered for confirmation to the U.S. Supreme Court by the US Senate.

Based on the IPI data, it is apparent that the Trump administration must face the reality that, unless a case is heard by the US Supreme Court, the outcome is likely to be influenced by judges that were appointed by Democratic presidents. Even when the Trump administration was fortunate enough to argue a case before a judge that was appointed by a Republican president, the administration won only 38% (3/8) of those judicial decisions. Thus, a key insight from the IPI database is that the administrators and general counsels of the regulatory agencies and OIRA need to do a much better job of building an appropriate administrative record for deregulatory decisions, buttressing the preambles

Table 3. Counts of Federal Judges (Active) by Partisan Affiliation of Appointing President (Updated January 31, 2018)

	Democratic Appointee	Republican Appointee	Total
Supreme Court	4	5	9
Circuit Judges	84	85	169
District Judges	326	231	557

Source: https://en.wikipedia.org/wiki/List_of_Presidents_of_the_United_States_by_Judicial_appointments, Retrieved February 4, 2019

¹⁵⁸ Richard L. Hasen. Polarization and the Judiciary. Annual Review of Political Science. 2019, in press, also available as Legal Studies Research Paper Series No. 2018-10. School of Law. University of California-Irvine, poseiden01.ssrn.com; TM Keck. Judicial Politics in Polarized Times. University of Chicago Press. 2014; CR Sunstein, D. Schkade, LM Ellman, A Sawicki. Are Judges Political? An Empirical Analysis of the Federal Judiciary. Brookings Institution, Washington, DC. 2006.

¹⁵⁹ Judicial appointment history for United States federal courts. En.m.wikipedia.org, retrieved January 20, 2019.

¹⁶⁰ Some scholars argue that a deregulation-minded administration may be inclined to pursue their favored policy even when the probability of judicial reversal is high. See William W. Buzbee. Agency Statutory Abnegation in the Deregulatory Playbook. Duke Law Journal. 2019, forthcoming.

¹⁶¹ In the two cases won by the Trump administration, one case was decided by a judge appointed by a Democratic president; the other case was decided by a judge appointed by a Republican president.

¹⁶² Connor Raso. Trump's Deregulatory Efforts Keep Losing in Court – and the Losses Could Make it Harder for Future Administrations to Deregulate. Report. Brookings Institution. Washington, DC. October 25, 2018; Jonathan Adler. Does the Trump EPA Know How to Deregulate? The Early Returns Are Not Promising. Reason.com. October 3, 2018.

to the rules, and strictly following proper administrative procedures under the APA.

For the Trump administration, the only positive news is that the judicial setbacks to date revolve around a few consistent shortcomings that might be correctable in future cases. Thus, we consider why the Trump administration is losing so many judicial decisions.

Before doing so, we note that pro-regulation groups have not persuaded the federal judiciary that Trump's signature "two-for-one" executive order on deregulation, EO 13771, is unlawful. In an important case not included in the IPI database, a federal district judge of the US District Court for the District of Columbia (Judge Randolph Moss, an Obama appointee) held in February 2018 that the pro-regulation groups lacked standing in the case. The court did not address the merits of the issue, so further litigation on this subject is likely in the future.

An overarching legal vulnerability for Trump's deregulatory initiatives is insufficient attention to the construction of an administrative record with factual findings that can support deregulation.¹⁶³ Weaknesses in the administrative record may be particularly serious in some of the deregulatory rulemakings related to energy and the environment.¹⁶⁴ So far, themes of the Trump administration's judicial setbacks have been (1) unlawful delay of effective dates, (2) failure to supply formal analyses required to support a deregulatory action, and (3) failure to consider the foregone benefits of a regulation. We consider each theme below.

UNLAWFUL DELAY IN THE EFFECTIVE DATES OF RULES

One of the Trump White House's first official actions, on January 20, 2017, was a Memorandum from the President's Chief of Staff (Reince Priebus) to the heads of all executive departments and agencies.¹⁶⁵ The memorandum was aimed at pulling back "midnight regulations" issued by the Obama administration. Specifically, regulators were instructed (1) to withdraw any Obama administration regulatory actions that were sent to the Office of the *Federal Register* but not

yet published in the Federal Register and, (2) for enacted regulations that were not yet effective, to extend the effective date of recent Obama Administration regulations by 60 days from the date of the memorandum, for the purpose of reviewing questions of fact, law and policy they raise. If the review raised substantial issues of law or policy, the agencies were instructed to take appropriate action in consultation with

the Director of the Office of Management and Budget. If the necessary delay was likely to be longer than 60 days, the memorandum instructs regulators to consider initiating a notice-and-comment rulemaking, including public comment, on the need for a longer delay.

In a majority of the 18 cases lost by the Trump administration, courts faulted the agencies for suspending or delaying effective dates in settings where the Trump appointees were planning a new rulemaking to repeal or modify the Obama rule. A new rulemaking typically takes at least six months to a year to complete and, for complex rules, a multi-year period of rulemaking is not uncommon.¹⁶⁶

In general, the courts have held that effective dates for completed rulemakings may not be delayed to allow time for Trump-appointed regulators to modify or repeal the Obama-era regulations. In effect, the courts ruled that delaying an effective date is equivalent to amending an existing rule, and such amendments must go through normal notice-and-comment rulemaking procedures under the Administrative Procedure Act of 1946.

Some of the cases have complicating features such as ongoing litigation against the Obama administration rule or unresolved requests by regulatees that Obama's final rule be reconsidered and modified by the agency. In those situations, the litigation against the Trump administration has been somewhat more complicated for the courts to resolve.

An illustration of the "effective date" litigation concerns a 2016 regulation that compels control of methane emissions from oil and gas facilities. The Trump EPA delayed the effective date to allow time for EPA to modify the rule to

“Thus, a key insight from the IPI database is that the administrators and general counsels and OIRA need to do a better job of building an appropriate administrative record for deregulatory decisions, buttressing the preambles to the rules, and strictly following proper administrative procedures under the APA.”

163 William W Buzbee. The Tethered President: Consistency and Contingency in Administrative Law. Boston University Law Review. 98. 2018, 1357-1442.

164 Bethany A Davis, Denise A Grab. Deregulation: Process and Procedures that Govern Agency Decisionmaking in an Era of Rollbacks. Energy Law Journal. 38. 2017, 269-295. On the sketchy and uneven technical case for deregulation in the oil and gas sector, see Alan J Krupnick, Arthur Fraas, Justine Huetteman, Isabel Echarte. Report. Resources for the Future. Washington, DC. November 2018.

165 Reince Priebus, Assistant to the President and Chief of Staff. Memorandum for the Heads of Executive Departments and Agencies. January 20, 2017.

166 On the concern about Trump-associated delays in implementing regulatory requirements, see Lisa Heinzerling. Unreasonable Delays: The Legal Problems (So Far) of Trump's Deregulatory Binge. Harvard Law and Policy Review. 12. 2018, 13, 16-47.

make it less burdensome.¹⁶⁷ A panel of the DC Circuit Court of Appeals (July 3, 2017) blocked the stay of the effective date. A majority of the Court (Judge David S Tatel, a Clinton appointee, and Judge Robert L Wilkins, an Obama appointee) ruled that the stay was arbitrary and capricious, in part because the issues the Trump EPA sought to address had already been addressed in the public comment period concerning the original 2016 rule.¹⁶⁸ The dissenter, Judge Janice Rogers, a Bush 43 appointee, argued that the court should not have ruled on the challenge to the stay until the Trump EPA's revision of the 2016 rule was final.

Although this case does have some complexity, the Trump EPA put the stay at greater risk of judicial reversal by deciding that the entire rule would be reconsidered during the stay (instead of a few targeted issues) and that the stay could last years. The lesson is: Once a rulemaking is final, it may not be changed or suspended indefinitely – absent compelling circumstances -- without going through another notice-and-comment rulemaking.¹⁶⁹

FAILURE TO SUPPLY FORMAL ANALYSES THAT ARE REQUIRED TO SUPPORT A DEREGULATORY ACTION

In 2017 the Trump administration, through the State Department, reversed a 2015 pipeline decision of the Obama administration, seeking to allow the Keystone pipeline from Canada to the Gulf Coast. While this action is technically an adjudication (rather than a regulatory action), the reaction of the federal judge illustrates the importance of proper formal analysis.

Between 2014 and 2017, and after a full-scale Environmental Impact Assessment was completed, a modified route for the pipeline through Nebraska was developed. Opponents of the pipeline sued the State Department for approving the revised pipeline plan.

In August 2018, the U.S District Court for the District of Montana (Judge Brian Morris, an Obama appointee) ruled that the State Department must complete a fuller Environmental Impact Statement.¹⁷⁰ Initially, Judge Morris did not revoke the presidential permit for the pipeline but, in a November 2018 follow-up ruling, Judge Morris temporarily blocked the permit for the pipeline until the

Trump administration addressed several complex issues related to climate change, cultural resources, and endangered species.¹⁷¹ In short, it is not enough for President Trump to order a deregulatory action; his administration must prepare the required analyses to support the action.

A highly publicized incident has raised questions about the Trump administration's commitment to prepare regulatory impact analyses in support of deregulatory actions. As explained earlier, in 2011 the Obama administration, through the Department of Labor, issued a final rule intended to ensure customers at restaurants that their tips would actually go to wait-staff. Under President Trump, DOL on December 5, 2017 issued a proposal calling for a partial rescission of the rule, seeking to give restaurant owners the freedom to allocate tips as the owners deemed appropriate. In a highly unusual situation, this economically significant proposal was released for public comment without a regulatory impact analysis as required under Executive Order 12866. Secondary sources have suggested that Trump administration officials did not agree with the draft analysis prepared by the DOL career staff and thus decided to propose the rule without any supporting analysis.¹⁷² Congress ultimately resolved the matter with appropriations language (described earlier in this report), so the procedural error by the administration is moot in this particular case.

Looking forward, President Trump will need competent regulatory analysis to support politically-sensitive rulemakings with strong implications for his re-election prospects and the re-election of his Republican allies in Congress. Consider the case of whether the EPA cap on ethanol blending of gasoline should be raised from 10% to 15% in the summer months of the year. According to a former congressional aide to Democratic Senator Tom Daschle of South Dakota, "this is a big deal -- it is not something that makes a front page on the East and West Coast newspapers, but it's something that farmers watch closely."¹⁷³

Specifically, in 2016 candidate Donald Trump pledged support of expanded ethanol blending to reduce foreign oil dependence and boost farm income in the Midwest (as most ethanol is made from corn).¹⁷⁴ Not surprisingly, the petroleum industry opposes EPA's ethanol-blending program, and

167 Michael Biesecker. EPA Chief Delays Methane Rule at Behest of Oil and Gas Firms. Associated Press. April 20, 2017; Jennifer A Dlouhy. Trump Takes His Assault on Obama Climate Regulations to Oil Wells. Bloomberg.com. September 10, 2018.

168 Lisa Friedman. Court Blocks EPA Effort to Suspend Obama-Era Methane Rule. New York Times. July 3, 2017.

169 Connor Raso. Trump's Deregulatory Efforts Keep Losing in Court – and the Losses Could Make it Harder for Future Administrations to Deregulate. Report. Brookings Institution. Washington, DC. October 25, 2018.

170 Timothy Gardner. U.S. Judge Orders Review of TransCanada's Keystone XL Pipeline Route. Reuters.com, 2018.

171 Fred Barbash, Allyson Chiu, Juliet Eilperin. Federal Judge Blocks Keystone KL Pipeline, Saying Trump Administration Review Ignored 'Inconvenient' Climate Change Facts. Washington Post. November 9, 2018.

172 Charles S. Clark. The Trump Administration War on Regulation. Govexec.com. 2018.

173 Eric Wolff. Trump's Ethanol Move Delivers Gift to Corn Country. Politico.com. January 20, 2019.

174 Matt Campbell. Trump Lifted Ethanol Restriction in Gasoline. Here's What It Means for Your Car and More. The Spokesman-Review. October 18, 2018.

organized environmentalists have become increasingly negative about ethanol made from corn.

In the run-up to the 2018 midterm elections, President Trump finally delivered on the 2016 promise by announcing in October that the administration would allow E15 to be sold at refueling stations all year round. Currently, only E10 is permitted during summer months, and some refueling stations do not want to invest in the changing of pumps and labels twice a year.¹⁷⁵ Since the Republican candidate for Governor of Iowa (Kim Reynolds) was trailing slightly in the polls, the timing of Trump's announcement was much appreciated in the Reynolds campaign, as Iowa is the number one corn-producing state and home to job-producing ethanol refineries. Reynolds ultimately won a close race, and will be a key actor when the Iowa caucuses take place in 2020, the presidential election year.

Some of the press coverage of Trump's E15 announcement was quite perceptive, pointing out that President Trump does not have the authority via executive order to raise the cap on ethanol blending. It must be accomplished by an EPA rulemaking or by new legislation, and that may be difficult to finish prior to the summer 2019 driving season.¹⁷⁶

The administrative record to support raising the cap may need to address a variety of technical, environmental and cost-benefit issues. Since ethanol is corrosive, will raising the ethanol blend from 10% to 15% damage the engines of old cars and lawn mowers? Will raising the ethanol blend create more smog-forming emissions? When additional land is put into production to grow more corn, what will be the impact on food prices, water supplies in rural areas, endangered species, and greenhouse gas emissions? Since ethanol has less energy content than gasoline, what will be the impact on vehicle mileage and fuel expenses for the consumer? A high-quality regulatory analysis of these issues will require careful collaboration between EPA career staff, staff at other agencies (the US Department of Agriculture and the US Department of Energy), OIRA and the political leadership of the Trump administration. If there are flaws in the regulatory analysis, they will be found as both the petroleum industry and national environmental groups oppose Trump's E15 pledge and will likely litigate the issue in federal courts.

FAILURE TO CONSIDER THE FOREGONE BENEFITS OF A REGULATION

In 2016, the Obama Department of Interior finalized a Waste Prevention Rule that required energy developers to reduce leaks of natural gas and the intentional venting and flaring of natural gas at production sites on Federal land. The rule was finalized in November 2016, with an effective date set for January 17, 2017. In response to the January 2017 instruction from the Trump White House, the Department of Interior delayed the effective date until June 15, 2017. A second, longer delay was issued by the Department in response to Presidential Executive Order No. 13783, which instructed agencies to suspend or rescind those agency actions that "unduly burden" the development of domestic energy sources. Meanwhile, the Department proceeded with work toward a notice and comment rulemaking that might have repealed or modified the 2016 rule.

In response to a challenge from environmental groups, a U.S. District Court from the Northern District of California issued a preliminary injunction against the second postponement, deciding that the plaintiffs were likely to prevail in showing that the second postponement was arbitrary and capricious.¹⁷⁷ The opinion was written by Judge Jeffrey S. White, an appointee of Bush 43. Among several concerns, Judge White noted that Interior took into account only the 2016 rule's costs to the oil and gas industry and ignored the rule's benefits such as decreased resource use, decreased air pollution, and enhanced public revenues (from royalties).

The theme of this 2018 judicial opinion drew heavily from a U.S. Supreme Court decision in the 1983 *State Farm* case.¹⁷⁸ The outcome of the *State Farm* case, though it was decided more than 35 years ago, should be considered carefully by the Trump administration as repeal of rules completed by the Obama administration is undertaken.

Specifically, the incoming Reagan administration, which was implementing candidate Ronald Reagan's 1980 campaign platform of "regulatory relief," rescinded a Carter administration auto-safety regulation issued by the NHTSA. The rule was rescinded without considering the benefits of airbag technology, which had been included in the Carter administration's cost-benefit analysis of the regulation. In the airbag-portion of the *State Farm* opinion, the Court held 9-0 that it was arbitrary and capricious for the NHTSA to rescind the safety standard without considering the foregone benefits of airbags.

¹⁷⁵ Of the 114,000 gasoline stations in the US, 1,400 (concentrated in 30 states) currently offer E15. *Ibid.*

¹⁷⁶ Some experts speculate that new legislation from Congress may be necessary to authorize year-round E15 use. If that is the case, Trump has made a pledge that could be quite difficult to deliver on. The partial government shutdown may also delay the anticipated EPA rulemaking. Mark Heller. E15 Fans Nervous as Shutdown Puts Pressure on Deadline. E&E News, January 22, 2019.

¹⁷⁷ Juliet Eilperin, Steven Mufson. Federal Court Blocks Trump EPA on Air Pollution. Washington Post, July 3, 2017.

¹⁷⁸ *Motor Vehicle Manufacturers Association v State Farm Mutual Automobile Insurance Company*. 463 U.S. 29 (1983).

In short, a presidential election does have policy consequences but changes of regulatory policy must still satisfy the “arbitrary and capricious” test under the Administrative Procedure Act of 1946.¹⁷⁹ An agency is allowed to change its mind, and one president is allowed to reconsider a regulatory decision made by his or her predecessor.¹⁸⁰ But, both benefits and costs of deregulatory changes need to be considered.

Some scholars believe that the federal courts are increasingly using cost-benefit thinking when applying the APA’s “arbitrary and capricious” test to rulemaking actions, regardless of whether the actions are deregulatory or regulatory.¹⁸¹ When reviewing acts of deregulation by the Trump Administration, courts are likely to look carefully at whether the agency considered the foregone benefits of regulation as well as the cost savings from deregulation. The best defense by the Trump administration in such litigation is a robust regulatory analysis of foregone benefits as well as cost savings.¹⁸²

FINDING #6:

The Trump administration is undertaking several deregulatory actions related to climate change, but those actions are vulnerable to delay or reversal through judicial or legislative interventions.

During the 2016 presidential campaign, candidate Donald Trump expressed skepticism and disbelief about climate change. He also pledged to cancel US participation in the United Nations Paris Accord of 2015 on the grounds that the climate agreement was not fair to US interests. And he pledged repeal of the EPA Clean Power Plan aimed at reducing greenhouse gases from coal-fired power plants.

During his first two years in office, President Trump has worked aggressively to follow through on his climate-related pledges. On June 1, 2017, President Trump announced that the US “will withdraw” from the Paris Climate Accord.¹⁸³ He left open the possibility that a new international agreement might be negotiated but influential leaders from Europe and other regions have opposed a renegotiation effort.¹⁸⁴

Technically, under the Paris Accord, a participating country may not withdraw until four years after the Accord went into effect. That works out to one day after the 2020 US presidential elections. At President Trump’s instruction, the State Department is taking the necessary steps for a US withdrawal while news of the US withdrawal around the world is causing some problems for the international agreement.¹⁸⁵

The Trump administration also has three climate-related rulemakings underway at EPA (one is joint with the Department of Transportation). The three rules will modify or replace rules adopted by the Obama administration.

First, the Trump EPA has proposed to replace the Clean Power Plan with the Affordable Clean Energy Rule (described earlier).¹⁸⁶ ACE establishes emission guidelines for states to develop GHG control plans at existing coal-fired power plants.¹⁸⁷ EPA determined that the “best system of emission reduction” (BSER) is on-site efficiency upgrades (also called “heat rate improvements”). A related EPA proposal relaxes GHG emissions requirements for new coal-fired power-plants. Second, the Trump EPA, jointly with the US Department of Transportation, is developing less stringent standards for GHG emissions from passenger cars and light trucks for model years 2021 through 2025. The “preferred” option is to freeze the GHG standards at the 2020 levels set by the Obama administration, without any increase in stringency from 2021 to 2025.¹⁸⁸ Finally, the Trump EPA has proposed less stringent standards for methane control at oil and gas facilities. Methane is a particularly potent greenhouse gas. The revisions, among other flexibilities, would give drillers more time both between inspections and to repair leaks when they happen.¹⁸⁹ Taken together, the three deregulatory rulemakings represent a major shift in climate policy compared to the Obama administration.

The three rulemakings are somewhat vulnerable to delay or reversal for a variety of reasons. The key complications are the EPA endangerment finding of 2009, the social-cost-of-carbon issue, the health “co-benefit” issue, and the changing

179 For a thoughtful discussion of the tension between policy change and continuity, see William W. Buzbee. *The Tethered President: Consistency and Contingency in Administrative Law*. Boston University Law Review. 98. 2018, 1348-1442.

180 *Federal Communications Commission v Fox Television Stations, Inc.* 556 U.S. 502 (2009).

181 Cass R Sunstein. *Cost-Benefit Default Principles*. Michigan Law Review. 99. 2001, 1651; Cass R Sunstein. *Cost-Benefit Analysis and Arbitrariness Review*. Harvard Environmental Law Review. 41. 2016. 1-41.

182 Bethany A Davis, Denise A Grab. *Deregulation: Process and Procedures that Govern Agency Decisionmaking in an Era of Rollbacks*. Energy Journal. 38(2). 2017, 269.

183 White House. *Statement by President Trump on the Paris Climate Accord*. June 1, 2017. [Whitehouse.gov](https://www.whitehouse.gov).

184 Jonathan Watts, Kate Connolly. *World Leaders React After Trump Rejects Paris Climate Deal*. The Guardian. June 1, 2017.

185 Mark Tutton. *‘Trump Effect’ Is Hurting Paris Agreement, Report Says*. CNN.com. December 4, 2018 (Russia and Turkey signed the Paris Accord but are now refusing to ratify it; Australia has abandoned legislation designed to comply with its Paris pledge; global investments in fossil fuels are rising again).

186 Ledyard King. *Trump’s Plan for Coal-Fired Power Plants: Key Takeaways about the EPA Clean Air Proposal*. USA Today. August 22, 2018.

187 EPA. *Review of Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units*. Proposed Rule. December 6, 2018.

188 Todd Spangler, Nathan Bomey. *Trump Administration Wants to Freeze Gas-Mileage Standards, Reversing Obama*. USA Today. August 2, 2018.

189 Heidi Vogt. *EPA Announces Proposal to Roll Back Obama-Era Rules on Methane Emissions*. Wall Street Journal. September 11, 2018.

congressional politics of climate change. Each issue is addressed briefly below.

ENDANGERMENT

A major source of vulnerability is that the Trump administration has not modified or withdrawn the “endangerment finding” made by EPA in 2009, after the 2007 Supreme Court decision in *Massachusetts v. EPA*. In a 5-4 decision, the Court held in 2007 that EPA has the authority to regulate greenhouse gases under the Clean Air Act and must regulate them if a finding of endangerment is made. In the December 2009 finding, EPA determined that six specific greenhouse gases may reasonably be anticipated to endanger the health and welfare of current and future generations.¹⁹⁰ Since 2009, additional scientific evidence from the federal government and university researchers around the world has buttressed EPA’s 2009 endangerment finding.¹⁹¹

As long as the endangerment finding is in place, the federal courts will examine Trump rulemakings from the perspective of whether they are a reasonable response to the endangerment finding and whether they have accounted for the additional climate science published since the 2009 finding. The Trump administration can argue that they have not eliminated federal climate regulation but hard questions will be asked as to whether each of the three deregulatory rulemakings at EPA is sufficiently responsive to the science of climate change.

SOCIAL COST OF CARBON

In conducting benefit-cost analyses of climate regulations, the Trump EPA has also changed an important technical factor used to compute the benefits of GHG control.¹⁹²

When analysts convert the benefits of GHG control into monetary units, a social cost of carbon (SCC) value (expressed in dollars per metric ton) is multiplied by the physical amount of GHG control. The figures used by the Trump administration (\$1 per ton or \$8 per ton, depending on the future discount rate) are much smaller than the roughly \$50/ton central figure used by the Obama EPA to support the Clean Power plan.¹⁹³

“An agency is allowed to change its mind, and one president is allowed to reconsider a regulatory decision made by his or her predecessor. But, benefits and costs of deregulatory changes need to be considered.”

The courts are likely to scrutinize this technical change. During the George W. Bush administration, regulators argued that the science of climate change was too inexact to support a numerical value for the SCC. Even today, some well-respected scientists believe that the complexity of climate change is too great to construct a meaningful and valid average SCC figure, especially given the possibility of non-linear catastrophic impacts.¹⁹⁴

In the first case where a federal court considered the SCC, the 9th Circuit Court of Appeals ruled in a motor vehicle case that the Bush Department of Transportation was “arbitrary and capricious” for not using a SCC value in benefit calculations. The court reasoned that, while the SCC might be uncertain, it is not zero.¹⁹⁵ The incoming Obama administration dealt with this issue on remand from the 9th Circuit.

During the Obama administration, a federal interagency task force was formed to address SCC. It issued several technical guidances that had the practical effect of increasing the recommended values of the SCC over time.¹⁹⁶ Instead of one value for the SCC, a set of SCC values was recommended based on alternative discount rates of 2.5%, 3.0% and 5.0%. By the time the Clean Power Plan was finalized, EPA was using a central SCC value on the order of \$50/ton.

190 EPA. Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act. 74 Federal Register 66,496 (December 15, 2009).

191 IPCC. Special Report. Global Warming of 1.5 Degrees Centigrade. 2018. ipcc.ch. Also, see Philip B Duffy, Christopher B Field, Noah S Diffenbaugh, Scott C Doney, Zoe Dutton, Sherri Goodman, Lisa Heinzerling, Solomon Hsiang, David B Lobell, Loretta J Mickley, Samuel Myers, Susan M Natali, Camille Parmesan, Susan Tierney, A Park Williams. Strengthened Scientific Support for the Endangerment Finding for Atmospheric Greenhouse Gases. *Science*. December 13, 2018. 10.1126/science.aat5982 (2018).

192 For a review of recent economic thinking about the social cost of carbon, see Maximilian Auffhammer. Quantifying Economic Damages from Climate Change. *Journal of Economic Perspectives*. 32(4). Fall 2018, 33-52.

193 Strictly speaking, the EPA Regulatory Impact Analysis for the Clean Power Plan used four values for the SCC: \$12, \$40, \$60, \$120 per short ton of CO₂ emissions in 2020 (\$2011). The first three values are based on discount rates of 5%, 3%, and 2.5%, respectively, while the largest value is included to capture the possibility of catastrophic outcomes of climate change coupled with a 3% discount rate. EPA. Regulatory Impact Analysis for the Clean Power Plan Final Rule. EPA-452/R-15-003. August 2015, 4-7.

194 M Granger Morgan, Parth Vaishnav, Hadi Dowlatabadi. Ines L Azevedo. Rethinking the Social Cost of Carbon Dioxide. *Issues in Science and Technology*. Volume XXXIII (4). Summer 2017, issues.org.

195 *Center for Biological Diversity v National Highway Traffic Safety Administration*. US Court of Appeals, Ninth Circuit, 538 F.3d 1172 (9th Circuit 2008).

196 The Interagency Working Group on the Social Cost of Carbon was renamed in August 2016 the Interagency Working Group on the Social Cost of Greenhouse Gases. The Working Group released an estimating approach in 2010 that was refined in several subsequent reports. See Interagency Working Group on the Social Cost of Carbon. Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis under Executive Order 12866. February 2010. The most recent report was Interagency Working Group on the Social Cost of Greenhouse Gases. Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866. Revision. September 2016.

The administrative processes used by the Obama administration to establish the SCC were not ideal but they did involve a substantial amount of public input and scientific participation, including participation by scientists and economists from multiple federal agencies.¹⁹⁷ The SCC then became a point of contention in 2016 litigation over the Department of Energy's 2014 refrigerator standards, where the agency used four alternative values for the SCC (\$11.8, \$39.7, \$61.2, and \$117 per metric ton in \$2012). The 7th Circuit Court of Appeals reviewed the SCC values and decided not to overturn them or compel the Department of Energy to reconsider them.¹⁹⁸

During the Obama administration, the federal government also commissioned two reports on the SCC from the well-respected National Research Council of the National Academies, a private organization chartered by Congress to provide scientific advice to the federal government. The first report concluded that the SCC values in use by the Obama administration were defensible on an interim basis while the second report established an ambitious long-term scientific agenda to resolve the many lingering uncertainties about the SCC.¹⁹⁹ The second NRC report was not issued until early in the Trump administration.

Soon after taking office, the Trump White House, via presidential executive order, disbanded Obama's interagency task force on SCC and withdrew the Obama-era technical guidance documents on SCC.²⁰⁰ OIRA informed the agencies that they should approach the SCC issue as they saw appropriate, taking into account the general guidance on benefit-cost analysis contained in OMB Circular A-4 (2003).

OMB Circular A-4 looms as an important document in the Trump administration because (a) it was adopted after an

extensive process of public participation and scientific peer review during the George W. Bush administration, (b) it was never withdrawn or modified by the Obama administration, and (c) it has been in practical use by the federal agencies for more than 15 years.²⁰¹ While A-4 does not speak

directly to the SCC value, it summarizes accepted principles of benefit-cost analysis that are highly relevant to computing the SCC.

When a regulation is expected to have impacts outside of the United States, A-4 instructs agency analysts to focus on the domestic impacts but report separately the impacts outside of the United States.²⁰² With respect to treatment of future costs and benefits, A-4 instructs agencies to report results with annual real discount rates of 3% and 7%. It also permits (but does not require) that results be computed based on a real discount rate of less than 3% in cases where intergenerational equity is an issue.²⁰³

“As long as the endangerment finding is in place, the federal courts will examine Trump rulemakings from the perspective of whether they are a reasonable response to the endangerment finding and whether they have accounted for the additional climate science published since the 2009 finding.”

What has emerged in the Trump administration is a different approach to the SCC that is consistent with the principles in OMB Circular A-4. Primary reliance is placed on the domestic SCC value while secondary results using the global SCC are also reported, usually in an appendix.²⁰⁴ The domestic SCC value is reported using discount rates of 3% and 7%, though some results with a rate of 2.5% may be included in an Appendix.²⁰⁵

The reason that Trump's position on the SCC is somewhat vulnerable is that the preambles to the deregulatory rulemakings do not provide fully coherent explanations as to why, when deregulatory decisions were made, the domestic SCC was given much more weight than the global SCC. Unless the policy rationale for the domestic SCC is buttressed,

197 For a useful review of the federal processes used to establish the SCC, see US Government Accountability Office. *Regulatory Impact Analysis: Development of Social Cost of Carbon Estimates*. Washington, DC. GAO-14-663. 2014.

198 *Zero Zone, Inc. v US Department of Energy*. Seventh Circuit Court of Appeals. August 8, 2016.

199 National Research Council. *Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide*. The National Academies Press. Washington, DC. 2017.

200 EO 13783.

201 John D. Graham. *Saving Lives through Administrative Law and Economics*. University of Pennsylvania Review. 157(2). 2008, 395, 528, footnote 259.

202 There is a subtle difference between impacts on US citizens and impacts inside the borders of the US. Some US citizens live outside the US borders, and impacts on them should be counted in the domestic SCC. When climate change hurts our trading partners or causes an influx of illegal immigration into the US, adverse impacts within the US borders will be felt and should be counted. In the long run, more sophisticated modeling can address these complications but, in the short run, it may be appropriate to use a suite of high and low values for the domestic SCC to capture some of the uncertainty. In all likelihood, the direct impacts of climate change on US citizens within the borders of the US will account for the vast majority of the correctly estimated domestic SCC. On the complications of estimating the domestic SCC, see National Research Council. *Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide*. National Academies Press. 2017, 51-53.

203 US Office of Management and Budget. *Circular A-4: Regulatory Analysis*. September 17, 2003.

204 EPA. *Regulatory Impact Analysis for the Review of the Clean Power Plan*. Proposal. October 2017, 168.

205 EPA. *Regulatory Impact Analysis for the Review of the Clean Power Plan*. Proposal. October 2017, 169.

and it can be,²⁰⁶ a federal court might be inclined to remand this issue for further consideration by an agency.

Briefly, reliance on the global SCC may have been appropriate in the Obama administration because President Obama determined that US participation in the Paris Accord was in the interests of the United States. Thus, the White House had agreed, through a complex set of international negotiations, to respect the interests of other countries that were impacted by GHG emissions from the United States. President Trump has a different perspective on the Paris Accord, and believes US interests have not been treated fairly. Since the US is withdrawing from the Paris Accord, it may be appropriate for the US to rely on a domestic SCC until a new international agreement is negotiated or until the US decides to re-join the Paris Accord.

It may ultimately be prudent for the Trump administration to make a concession to other countries about the climate externalities imposed by the US economy, but Trump may wish to extract some concessions in return (e.g., from Europe on payments for NATO and from China on abusive trade practices and protection of intellectual property held by US inventors). Notice that the Trump administration may prefer to negotiate the climate issue with a limited number of key countries in a setting where multiple diplomatic issues are on the agenda. President Obama made progress with China on climate change in the context of a broader resetting of the relationship.²⁰⁷ Thus, climate-only discussions in a United Nations forum may not be seen as in the best near-term interest of the US.

On the discount rate, environmental economists tend to prefer a lower consumption-based rate of 3% (to account for uncertainty about future growth) but economists from other subfields, especially those who focus on tradeoffs in capital markets, tend to prefer higher discount rates, as high as 7%.

It seems unlikely that a federal court would intervene on the choice of a proper discount rate to use in regulatory analysis, even though the choice of discount rate has a powerful impact on the magnitude of the SCC.²⁰⁸

HEALTH “CO-BENEFITS”

A related but important issue in the three deregulatory climate rulemakings is whether regulators gave adequate attention to “co-benefits” that result when industry reduces GHG emissions. The same requirements that reduce GHG emissions (especially those that reduce energy consumption or shift the market from coal to natural gas) tend to reduce other forms of air pollution related to smog and soot.²⁰⁹ Exposures to those pollutants in cities have well established relationships with excess rates of premature death and morbidity.²¹⁰ The magnitude of the co-benefits, in dollar terms, are often much larger than the GHG control benefits, even if the primary regulatory purpose is GHG control.²¹¹ In its deregulatory rulemakings, the Trump administration is acknowledging the foregone co-benefits but giving them relatively little weight in determining regulatory stringency.²¹²

As a rationale for giving little weight to co-benefits, the Trump EPA appears to be relying on a legal argument that regulation of pollutant A may not be justified primarily by the co-benefits that occur from reducing pollutant B, especially when EPA has other regulatory programs to address pollutant B.²¹³ In a recent proposal from EPA about mercury regulation at electric power-plants, EPA argues that the regulation of mercury (and other hazardous air pollutants) may not be justified primarily through co-benefits related to smog and soot control.²¹⁴

A similar type of legal argument can be used to dismiss or down-weight the co-benefits in the climate rulemakings. We are agnostic as to the validity of the legal argument but the agencies and OIRA should also take a harder technical look at

206 Art Fraas, Randall Lutter, Susan Dudley, Ted Gayer, John D. Graham, Jason F. Shogren, W. Kip Viscusi. Social Cost of Carbon: Domestic Duty. *Science* 351 (6273). 2016, 569.

207 Michael Fullilove, Fergus Green. Obama Sets the Tone for U.S.-China Cooperation on Climate Change. Brookings Institution. Washington, DC. December 8, 2009; John D. Graham. Obama on the Home Front: Domestic Policy Triumphs and Setbacks. Indiana University Press. 2016, 233.

208 For a good discussion of the discount rate in the climate context, see National Research Council. Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide. National Academies Press. 2017, 157-184.

209 On the history of “co-benefits” as a concept in the climate policy debate, see Jan P Mayrhofer, Joyeeta Gupta. The Science and Politics of Co-Benefits in Climate Policy. *Environmental Science and Policy*. 57. March 2016, 22-30.

210 See J Lepeule, F Laden, D Dockery, J Schwartz. Chronic Exposure to Fine Particles and Mortality: An Extended Follow-up of the Harvard Six Cities Study from 1974 to 2009. *Environmental Health Perspectives*. 120(7). 2012, 965-970; D Krewski, M Jerrett, RT Burnett et al. Extended Followup and Spatial Analysis of the American Cancer Society Study Linking Particulate Air Pollution and Mortality. Research Report 140. Health Effects Institute. Boston, MA. 2009. But see Louis Anthony (Tony) Cox, Jr. Miscommunicating Risk, Uncertainty, and Causation: Fine Particulate Air Pollution and Mortality Risk as an Example. *Risk Analysis*. 32(5). 2012, 765-767 (expressing skepticism as to whether the reported statistical associations reflect a causal relationship).

211 When regulating GHG emissions from coal plants, the health co-benefits may be at least as large as the GHG benefits. Jonathan J Buenocore, Kathleen F Lambert, Dallas Burtraw, Samantha Sekar, Charles T Driscoll. An Analysis of the Costs and Health Co-Benefits for a US Power Plant Carbon Standard. *PLoS*. 11(6). 2016. Doi:10.1371/journal.pone.0156308.

212 Lisa Friedman. Cost of New EPA Coal Rules: Up to 1,400 More Deaths a Year. *New York Times*. August 21, 2018.

213 The legal relevance of EPA’s co-benefit claims was left unresolved by the U.S. Supreme Court in a challenge to the Obama-era mercury regulation. In this rulemaking, co-benefits from smog and soot control accounted for 99.9% of the monetized benefits of the mercury rule. Considered alone, the mercury-control benefits of the regulation were far smaller than the projected costs of controlling mercury. See *Michigan v EPA*, 135 S. Ct. 2699 (2015).

214 <https://www.epa.gov/mats/proposed-revised-supplemental-finding-and-results-residual-risk> (2018).

the co-benefit claims being made by federal agencies, especially the extent of scientific uncertainty about those claims.²¹⁵

CHANGING CLIMATE POLITICS IN CONGRESS

The three Trump climate rulemakings are likely to be scrutinized by an increasingly skeptical Congress. Even before the 2018 midterm elections, the Republican-majority Congress was expressing some independence on climate policy.

In 2017 EPA's Obama-era methane rule was slated for repeal under the Congressional Review Act. All that was required was a simple majority vote in the House and Senate, as President Trump supported the effort. While the CRA disapproval resolution passed the Republican-majority House, it was defeated in the Senate when three Republican Senators (John McCain, Susan Collins and Lindsey Graham) joined a unified Democratic Congress against the disapproval resolution.²¹⁶ If more Republican Senators become interested in the climate-change issue, the Trump administration's current climate-policy position could become aligned with a minority view in the Congress.

Looking forward to the next two years, President Trump will be dealing with a Democratic majority in the House of Representatives. The changing composition of the House will have a disproportionate impact on climate-related policies because climate-change is such a high priority issue for many Democratic politicians. The Republicans did pick up two seats in the Senate, where sixty votes are required to legislate, but it is not yet clear where the Republican Senate will be on the climate issue in 2019-2020.

It is too early to predict President Trump's re-election prospects, but the 2020 congressional elections may not be easy for the Republican Party. Unless President Trump's job-approval rating rises significantly, GOP challengers in the House may have a tough time gaining traction. In the Senate, the GOP will be defending more seats than they were in 2018, though both parties have opportunities for pickups.²¹⁷

President Trump will have the veto threat to deter efforts at repealing or modifying his climate rulemakings. Democrats in Congress will have access to a wide range of oversight and appropriations tools to slow and obstruct his deregulation

agenda. The more strength the Democratic Party acquires in Congress and the more unified Democrats become on the climate issue, the more obstacles President Trump will face to finalizing and implementing his deregulatory agenda on climate change. Under these conditions, the Trump administration might benefit from a proactive legislative position on climate change. We mention some options later in the recommendations.

FINDING #7:

An unintended consequence of federal deregulation under Trump has been determined growth in state and local regulations on some issues.

In a federalist system of government, the overall burden of regulation is a function of actions taken by state and local regulators as well as federal regulators. If businesses experience or fear a proliferation of conflicting state and local regulations, a uniform national regulatory solution may be sought by the business community. This situation is worthy of special analysis when the commercial enterprises are selling products across state lines, and where there are incremental costs of producing different products for different state and local jurisdictions.

One of the unintended consequences of Trump's deregulation program is that some state and local governments are becoming more aggressive in their regulatory policies.²¹⁸ To support finding #7, we present three illustrations of the intergovernmental dynamic: internet regulation, greenhouse gas regulation for motor vehicles, and industrial-chemical regulation.

INTERNET REGULATION

The Federal Communications Commission (FCC) is an independent agency that does not report its regulations to the White House for approval. However, Presidents have influence over FCC through the appointment of Commissioners.

In 2015 the Federal Communications Commission (FCC), led by President Obama's appointees, asserted broad regulatory authority over internet providers. A new rule prohibited several practices such as discrimination against

215 EPA has never fully responded to recommendations that they enhance the quantitative analysis of uncertainty about the health benefits of air regulations. National Research Council. Estimating the Public Health Benefits of proposed Air Pollution Regulations. National Academies. 2002. There are new scientific contributions to this issue. On the one hand, recent published research suggests that EPA may have understated the uncertainties about the magnitude of co-benefits from reducing soot and smog, especially in areas of the country with relatively clean air. Louis Anthony (Tony) Cox, Jr. Reassessing the Human Health Benefits from Cleaner Air. Risk Analysis. 32(5). 2012, 816-829; Anne E Smith. Inconsistencies in Risk Analyses for Ambient Air Pollution Regulations. Risk Analysis. 36(9). 2015, 1737-1744. On the other hand, there is new research, based on publicly available data, linking inhalation of fine particles to premature death, even at levels of exposure that EPA has traditionally defined as adequately protective of public health. Qian Di, Yan Wang, Antonella Zanobetti, Yun Wang. Air Pollution and Mortality in the Medicare Population. New England Journal of Medicine. 376. 2017, 2513-2522.

216 Juliet Eilperin, Chelsea Harvey. Senate Unexpectedly Rejects Bid to Repeal a Key Obama-Era Environmental Regulation. Washington Post. May 10, 2017.

217 Manas Sharma, Aaron Blake, Armand Emamdjomeh, Chiqui Esteban. Here's What the 2020 Senate Map Looks Like. The Washington Post. November 21, 2018.

218 Jessica Bulman-Pozen. Partisan Federalism: Examining the Interaction of Party Politics and Federalism. Harvard Law Review. 127(4). 2014, 1077.

lawful content by blocking websites or apps, slowing the transmission of lawful data based on its content, and creating internet fast lanes for companies and consumers who pay premiums, and slow lanes for those who do not pay premiums. More generally, the FCC rules sought to preclude internet bundling, where premium fees might be charged by providers for access to a package of social media sites. Without regulation of such practices, some users (e.g., low-income households, small businesses and start-up companies) feared that they would face higher costs to do their jobs and run their households. President Obama publicly supported what became known as the “net neutrality” regulations.

The FCC reversed its course in late 2017 when a new Commission with President Trump’s appointees repealed the net-neutrality rule. The FCC argued that there was insufficient evidence of harm to consumers to justify net-neutrality regulation. Concerns were also expressed that the 2015 regulation could thwart innovation in the industry.²¹⁹ For the Trump administration, FCC’s deregulatory action was responsive to his 2016 campaign pledge.

A slim majority (52 to 47) in the US Senate voted to overturn the FCC’s deregulatory action, but the House did not act and President Trump could veto any congressional effort to overturn FCC.²²⁰ A coalition of 20 states favoring the 2015 rule sued the FCC, arguing that the FCC has exceeded its authority. Given the commercial importance of the internet, a decision of the US Supreme Court may be necessary to resolve the matter.

Within a month of FCC’s late 2017 decision, some state legislatures and regulators began pushing back against deregulation of the internet.²²¹ By mid-January of 2018, legislators in several states – including California, Illinois, Massachusetts, Nebraska, New York, North Carolina and Washington – had introduced bills to restore net-neutrality regulation or adopt different forms of internet regulation. The prospect of a proliferation of uncoordinated state regulatory regimes was evident.

“In a federalist system of government, the overall burden of regulation is a function of the actions taken by state and local regulators as well as federal regulators.”

The State of California, acting in August 2018, was the fourth state to create net neutrality regulation, a measure that is actually more prescriptive in some ways than the 2015 FCC regulation. The California action is especially significant because of the large size of the state’s economy and the state’s track record as a leader in other fields of regulation, such as automotive emissions control. California legislators framed the new legislation as a way to stand up to “Donald Trump’s FCC.”²²²

In September 2018 the Justice Department sued California on the grounds that the California law was illegal, since Congress had granted FCC the power to regulate the internet.²²³

In January 2019, a 3-judge panel of the D.C. Circuit Court of Appeals heard challenges to FTC’s case for deregulation.²²⁴ Years of complex litigation are underway.

REGULATION OF GREENHOUSE GASES FROM MOTOR VEHICLES

In 2012, the Obama administration, through a collaborative rulemaking by the EPA, NHTSA, and the State of California,

set ambitious greenhouse-gas standards for cars and light trucks for model years 2017 to 2025. California agreed that if automakers complied with the federal standards through model year 2025, the State would accept federal compliance as evidence of compliance with California’s standards. EPA and the California Air Resources Board (CARB) relied on legal authority from the Supreme Court’s 2007 decision in *Massachusetts v. EPA*, where the Court held that carbon dioxide

is a pollutant within the meaning of the Clean Air Act.²²⁵

The federal Clean Air Act has a special provision authorizing California to seek EPA approval to set its own motor vehicle emissions standards, and other states are allowed to either follow California or the EPA standards. In this case, California agreed to harmonize with the federal standards. NHTSA has separate authority under a 1974 law passed by Congress after the Arab oil embargo of 1973-74.

The Trump administration, reversed a late 2016 decision by the Obama EPA to retain the 2022-2025 GHG standards.²²⁶ In a joint rulemaking between EPA and NHTSA, multiple

219 Cecilia Kang. FCC Repeals Net Neutrality Rules. New York Times. December 14, 2017.

220 Cecilia Kang. Senate Democrats Win Vote on Net Neutrality, a Centerpiece of 2018 Strategy. New York Times. May 16, 2018.

221 Cecilia Kang. States Push Back After Net Neutrality Repeal. New York Times. January 11, 2018.

222 Cecilia Kang. California Lawmakers Pass Nation’s Toughest Net Neutrality Law. New York Times. August 31, 2018.

223 Cecilia Kang. Justice Department Sues to Stop California Net Neutrality Law. New York Times. September 30, 2018.

224 The panel has two judges appointed by Democratic presidents and one judge appointed by a Republican president. Brent Kendall, John D. McKinnion. Net Neutrality Faces Legal Challenges Testing Trump Agenda. Wall Street Journal. February 1, 2019. A4.

225 *Massachusetts v. EPA*. 549 U.S. 497 (2007).

226 A three-judge panel of the D.C. Circuit Court of Appeals has decided to hear a merit challenge to EPA’s decision to reopen the 2012-2025 standards. Two of the three judges were appointed by Democratic presidents.

deregulatory options for model years 2021 to 2025 were proposed. This rulemaking, once finalized, is likely to be challenged under the APA as arbitrary and capricious due to alleged flaws in the supporting Regulatory Impact Analysis.²²⁷ But, the bigger issue is that CARB was not included in the rulemaking. Indeed, the preamble to the proposed rule asserts federal preemption of California's right to enact its own GHG regulations, based on language in the 1974 legislation that creates NHTSA's authority to regulate fuel economy. While regulation of greenhouse gases might appear to be a different matter than fuel economy regulation, the two performance standards are closely related from a technical perspective and automakers resort to roughly the same suite of technologies when complying with the two standards. Two federal district courts have ruled that NHTSA's fuel economy authority does not preempt California's authority to set GHG standards under the Clean Air Act, but the issue has never been addressed by a federal appeals court or the U.S. Supreme Court.²²⁸

California has warned the Trump administration that the State intends to enforce stricter standards on auto makers if the administration proceeds with deregulation in this area. California cites the Clean Air Act where Congress gave California special authority to regulate motor vehicle emissions as long as those regulations are not weaker than EPA standards. Other states are likely to follow California's lead. When President Trump took office in January 2017, a total of 13 states representing about 30% of new vehicle sales in the US had already adopted California motor vehicle emissions standards. In reaction to the Trump administration's deregulatory efforts in this area, additional states are considering whether they should join the California program. The State of Colorado has already decided to adopt the California standards and other states (e.g., Virginia) are reported to be considering similar action.²²⁹

Petroleum industry interests may be more enthusiastic about Trump's deregulatory proposal than auto industry interests.²³⁰ The two major trade associations representing

the auto industry have pleaded with California regulators and the Trump administration to negotiate and settle their differences.²³¹ Both associations want a uniform national regulatory system, even if that means that the federal standards might be stricter than the standards preferred by the Trump administration. At the same time, some segments of the auto industry want more flexibility to meet the federal standards as well as an extension of federal subsidies to help consumers pay for California's mandate of plug-in electric vehicles. The collapse of oil and gasoline prices since 2014 has made it more difficult for automakers and dealers to sell fuel-efficient and plug-in electric vehicles than when the Obama-era standards were established in 2012.²³²

This issue may also be headed to the U.S. Supreme Court. The D.C. Circuit Court of Appeals is already hearing a case against the Trump administration for reopening the rulemaking process without an adequate record. But, now that Justice Kennedy has been replaced by Justice Brett Kavanaugh, some conservative legal experts believe that there might be five justices on the Court who could be persuaded to hold that the federal government's authority preempts California's authority to regulate greenhouse gases from motor vehicles. The Supreme Court's 2007 decision in *Massachusetts v. EPA* was a 5-4 majority in favor of EPA regulation of greenhouse gases, with Justice Kennedy supplying the crucial fifth vote. And the 2007 decision did not speak directly as to whether California had authority to regulate in this area.²³³ Thus, by seeking deregulation in this area, the Trump administration has triggered complicating state regulations and extensive litigation.

FEDERAL REGULATION OF INDUSTRIAL CHEMICALS

In 2016 bipartisan legislation was passed by the Congress to modernize EPA's authority under the Toxic Substances Control Act of 1976.²³⁴ Environmentalists argued that EPA was regulating too few chemicals under TSCA while industry sought a stronger national regulatory system to preclude or discourage state and local governments from regulating or

227 A team of environmental and energy economists argues that the fleet-turnover model used by EPA and DOT to justify the relaxed motor vehicle standards is flawed. Antonio M Bento, Kenneth Gillingham, Mark R Jacobsen, Christopher R Knittel, Benjamin Leard, Joshua Linn, Virginia McConnell, David Rapson, James M Sallee, Arthur A van Benthem, Kate S Whitefoot. *Flawed Analyses of US Auto Fuel Economy Standards*. Science. 362(6419). 2018, 1119-1121.

228 On the history of this litigation, see Kevin O. Leske. *A Closer Look at Green Mountain Chrysler v. Crombie*. Vermont Law Review, 32, 2008, 339-475.

229 David Migoya. *Colorado Will Adopt California-Style Low-Emission Vehicle Standards Under Hickenlooper Order*. Denver Post. June 19, 2018.

230 Hiroko Tabuchi. *The Oil Industry's Covert Campaign to Rewrite American Car Emissions Rules*. New York Times. December 13, 2018.

231 David Shepardson. *Major Automakers Urge Trump Not to Freeze Fuel Economy Targets*. Reuters.com. May 7, 2018.

232 Sanya Carley, Denvil Duncan, John D. Graham, Saba Siddiki, Nikos Ziogiannis. *A Macroeconomic Study of Federal and State Automotive Regulations*. School of Public and Environmental Affairs. Indiana University. March 2017, 44-52, 117, 149-152.

233 During the George W. Bush administration, two federal district courts (one in Vermont, the other in Fresno, California) ruled against the industry's claim that the 1974 CAFÉ law preempts California's authority to regulate greenhouse gases. Felicity Barringer. *U.S. Court Backs States' Measures to Cut Emissions*. New York Times. September 13, 2007; John M. Broder. *Federal Judge Upholds Law on Emissions in California*. New York Times. December 13, 2007. Before the industry could appeal the two decisions to a higher court, the industry negotiated a new national CO2 control program with the Obama administration. John D. Graham. *Obama on the Home Front: Domestic Policy Triumphs and Setbacks*. Indiana University Press. Bloomington, Indiana. 2016, 225-226.

234 Darryl Fears. *The President Just Signed a Law that Affects Nearly Every Product You Use*. Washington Post. June 22, 2016.

banning industrial chemicals. The 2016 legislation includes a limited preemption provision that operates in settings where EPA has taken action on a chemical or is actively deliberating on the chemical.

The Obama administration did begin to implement the legislation, but the Trump administration was the first presidential administration to issue the “framework rules” that cover how the revised TSCA will be implemented by EPA.²³⁵ Environmental groups are objecting that EPA is not following the terms of the new legislation, and litigation is underway on some of those issues. If the Trump administration does not take sufficient regulatory action under the new legislation, the chemical industry may face a proliferation of uncoordinated state and local regulatory actions on chemicals. It is too early to tell how this area of regulation will unfold, but it is an excellent illustration of how regulatory burden on industry is influenced by the actions of state and local regulators as well as federal regulators.²³⁶

In summary, federal deregulatory initiatives do not occur in a vacuum. Pro-regulation forces can shift their energies to the state and local levels of government, thereby producing a proliferation of conflicting regulations. Smart deregulation requires careful thinking as to how to anticipate and prevent the state and local backlash, or how to achieve a negotiated solution to federal regulation that deters the state and local backlash.

235 EPA. EPA Meets Important Milestone: Proposes Fees Rule, the Final of Four Framework Rules for EPA Chemical Safety Evaluations under TSCA. [Epa.gov](https://www.epa.gov/chemical-safety/epa-meets-important-milestone-proposes-fees-rule). February 8, 2018.

236 Progressive scholars sometimes describe acts of federal preemption as a form of “deregulation” since the powers of state and local regulators are withdrawn. Phillip J. Cooper. *The War Against Regulation: From Jimmy Carter to George W. Bush*. University of Kansas Press. 2009, p. 3.

9.0 RECOMMENDATIONS

In this final section, we offer some conditional recommendations as to what the Trump administration might do to buttress the President's effectiveness as a deregulator. The recommendations are conditional in the sense that we are accepting the president's deregulation agenda as given. We have not evaluated the economic, health, social and environmental consequences of the specific rulemakings or the agenda as a whole. Thus, our recommendations are not a normative endorsement of Trump's agenda. Some of our recommendations, while likely helpful to the Trump administration in its pursuit of deregulation, have other rationales that may be appealing to readers who do not share President Trump's passion for deregulation.

1. The unfilled leadership posts at federal agencies should be filled by the Trump administration as soon as possible.

If the administration's only objective is to halt the issuance of new regulations, then regulatory offices without leadership can serve the administration's interests. Since President Trump is determined to accomplish removal of existing regulations or reform of existing regulations to make them less burdensome and intrusive, vacant regulatory posts are a problem that needs to be solved.

The completion of deregulatory rulemakings is a sensitive, complex, and evidence-intensive process. Career staff in the regulatory agencies are more likely to work diligently and constructively on such rulemakings if their agency is led by a qualified Trump appointee who has been confirmed by the Senate. If a political appointee has not been confirmed, career staff may question the legitimacy, influence, or longevity of the appointee. Without the assistance of the career staff in the agencies, it is unlikely that deregulatory rulemakings will be completed in a judicially defensible manner.²³⁷ There may also need to be some improvements in the Trump administration's personnel policies and in appointee-careerist working relationships in order to achieve high-quality deregulatory rulemakings.²³⁸

The Republican Party's net gain of two Senate seats in the 2018 midterm elections expands the GOP margin from 51 to 49 to 53 to 47. While that gain may seem small, it does make it easier for President Trump to accomplish Senate

confirmation of his executive nominations. Since the Senate and House are unlikely to have shared legislative agendas in 2019-20, there should be plenty of floor time for executive as well as judicial nominations.

2. When the Office of Management and Budget (OMB) reports the number of deregulatory and regulatory actions, the same type of actions should be counted on the regulatory and deregulatory sides of the ledger.

OIRA is not currently making apples-to-apples comparisons under the two-for-one executive order. If only significant new regulations are counted as pro-regulatory actions, then only significant deregulatory actions should be allowed to offset them. This recommendation is particularly important for OIRA's public communications about progress on deregulation, as the ratios currently reported lack credibility.

3. New tools are needed to measure the impact of regulatory and deregulatory actions as to their impact on freedom.

Not all regulations are equally intrusive, yet the two-for-one accounting system implicitly assumes that they are. A new measurement system should be devised and validated, one that accounts for the degree of a regulation's intrusion on each regulatee as well as the number of regulatees that are impacted. The system could be semi-quantitative or continuous, as either would be more defensible than the current approach that does not consider the extent of regulatory impacts on freedom. Research is needed to develop the tools that can assist agencies and OIRA in understanding the extent of regulatory intrusion and deregulatory liberation. OIRA should request the National Science Foundation to commission tools-oriented R&D into how changes in human freedom due to regulation can be defined and measured.

4. The foregone benefits of regulation need to be taken seriously in regulatory impact analyses, agency decision making and OMB communications about federal regulatory policy.

When a regulation is rescinded or made less burdensome or intrusive, benefits may be foregone that would have occurred

237 On the crucial role of career staff in achieving regulatory excellence, see Cary Coglianese (ed). *Achieving Regulatory Excellence*. Brookings Institution Press. Washington, DC. 2017, 12-13.

238 The Trump administration's next two years need stronger personnel policies, more respect for administrative procedure, and better working relationships between careerists and political appointees. This is not simply good government; it is essential to the success of Trump's deregulatory strategy. Rachel Augustine Potter. *The Trump Administration's Regulatory Corner-Cutting Isn't Just Bad for Democracy – It's a Bad Strategy*. Center on Regulation and Markets. Brookings Institution. Washington, DC. November 20, 2018. Similar problems, though perhaps not quite as widespread or severe, diminished the effectiveness of the George W. Bush administration. See David E Lewis. *The Politics of Presidential Appointments: Political Control and Bureaucratic Performance*. 2008; William G Resh. *Rethinking the Administrative Presidency: Trust, Intellectual Capital, and Appointee-Careerist Relations in the George W. Bush Administration*. Johns Hopkins University Press. Princeton University Press. 2015.

if the regulation had been implemented and enforced. Foregone benefits, which may be qualitative or quantitative in nature, can relate to a variety of welfare outcomes such as economic wellbeing, health status, social equity and environmental quality. Failure of agencies to analyze foregone benefits will undermine public confidence in regulatory analysis and put deregulatory actions at significant risk of judicial and legislative reversal. Like smart regulation, smart deregulation includes careful consideration of the societal consequences on both sides of the cost-benefit ledger.

5. The Trump administration should revise its climate rulemakings to make them less vulnerable to judicial reversal; given the changing composition of the Congress, it should also consider a legislative initiative on climate policy.

EPA's final climate rulemakings should be revised to make them more responsive to the agency's 2009 endangerment finding and the additional climate science that has been published since 2009. The final rules may not need to be as stringent as the Obama-era rulemakings but they need to be responsive to the climate science and based on improved analyses of the benefits of reducing GHGs and related co-benefits. A clear policy rationale should be provided as to why the EPA shifted from primary reliance on a global social cost of carbon to primary reliance on a domestic social cost of carbon.

Given that the politics of climate change are likely to shift in the new Congress, the Trump administration should also consider developing a legislative position on climate change. Without such a position, the administration risks being excluded from legislative dialogue.

One option is a pro-technology stance that calls for expanding federal R&D to advance promising technologies such as nuclear, solar, carbon capture and storage, new battery technologies and hydrogen fuel cell vehicles.

Retiring Republican Senator Lamar Alexander of Tennessee

has been an effective champion of R&D strategies to address climate change.²³⁹ Another option is to emphasize energy efficiency and low-carbon technologies in the forthcoming legislative debate on infrastructure. A different option would be to coordinate policy positions on trade and climate, leading to heightened pressure on China to be both cleaner and fair in its trade practices.²⁴⁰ Insofar as the administration is opposed to a regulatory approach on climate change, it may be sensible to consider replacing federal and state authority to regulate greenhouse gas emissions with a revenue-neutral national carbon tax.²⁴¹ An appropriate price on carbon is the most cost-effective way to address the concerns about climate change contained in the 2009 endangerment finding.²⁴² The public opposition to carbon taxes in the State of Washington and France underscores the challenges in adopting such a policy option. Revenues from the carbon tax could be used to finance tax cuts for individuals and businesses.²⁴³ Any or all of these options could be linked to a renewed long-term effort to renegotiate the Paris Accord in a direction more favorable to US interests.

6. When devising federal regulatory and deregulatory solutions, the Trump administration should take into account the prospects of future state and local regulations.

In our federalist system, a proliferation of conflicting state and local regulations may be the predictable result of a regulatory vacuum at the federal level.²⁴⁴ The Trump administration needs to engage in careful legal, economic, and political analysis of the opportunities for federal preemption of state and local regulatory actions.²⁴⁵ On the other hand, the potential for policy experimentation and learning due to state and local innovation in regulatory choice should also be considered.²⁴⁶ On occasion, a negotiated solution between federal and state regulators may be superior to years of unpredictable litigation.

239 Stephen Stromberg, The Bad GOP and Good GOP on Climate Change. Washington Post. March 31, 2015; Andy Sher, Alexander Downplays US Climate Accord Exit, Calls for Doubling Energy Research. June 2, 2017. <https://www.timesfreepress.com/news/breakingnews/story/2017/jun/02/alexander-downplays-us-climate-accord-exit/431427/>

240 George David Banks, Finally Some Fairness in Global Reporting of Greenhouse Gas. January 15, 2019. <http://accf.org/2019/01/15/finally-some-fairness-in-global-reporting-of-greenhouse-gas/>

241 For a bipartisan case for a national carbon tax that replaces climate regulations, see "Economists' Statement on Carbon Dividends." Wall Street Journal. January 16, 2019 (signed by 45 prominent economists with affiliations in both political parties, including several recipients of the Nobel Memorial Prize in Economic Sciences).

242 William Nordhaus, The Climate Casino: Risk, Uncertainty, and Economics for a Warming World. Yale University Press. 2013.

243 George P Shultz, James Baker III. A Conservative Answer to Climate Change. Wall Street Journal. February 7, 2017, reprinted at hoover.org.

244 In some cases, a federal regulatory agency may encourage (or defer to) state regulatory action so that the federal agency will not have to address the cost-benefit requirements of EO 12866 and OIRA review. Nina A Mendelson, Jonathan B Wiener, Responding to Agency Avoidance of OIRA. Harvard Journal of Law and Public Policy. 37 (2). 2014, 496-500; John D. Graham, Cory R Liu, Regulatory and Quasi-Regulatory Activity Without OMB and Cost-Benefit Review. Harvard Journal of Law and Public Policy. 37. 2014, 425, 431-439.

245 There is guidance on such issues in a 1999 order issued by President Clinton. EO 13132.

246 On the importance of regulatory experimentation and learning, see Michael Greenstone, Toward a Culture of Persistent Regulatory Experimentation and Evaluation. In New Perspectives on Regulation (eds., David Moss, John Cisternino). The Tobin Project. Cambridge, Massachusetts. 2009.

APPENDIX: NAMES OF CONSULTED EXPERTS AND THEIR AFFILIATIONS

The authors thank the following individuals for referring us to useful information (*), answering our questions (**), or serving as a peer reviewer of our draft manuscript (***). In order to encourage candid responses to our questions, we have not attributed specific viewpoints to specific individuals. Several unlisted experts agreed to be interviewed but requested that they remain anonymous.

Jonathan H. Adler,*** Case Western University

Howard Beales,** Regulatory Studies Center, George Washington University

James Broughel,** Mercatus Center, George Mason University

Cary Coglianese,** Penn Program on Regulation, University of Pennsylvania

Jamie Conrad,*** Conrad Law and Policy Counsel

Clyde Wayne Crews Jr.,** Competitive Enterprise Institute

John Cuaderes,** Senate Committee on Homeland Security and Governmental Affairs

Bridget C. E. Dooling,*** Regulatory Studies Center, George Washington University

Susan E. Dudley,** Regulatory Studies Center, George Washington University and former OIRA Administrator under President George W. Bush

Ross Eisenberg,** National Association of Manufacturers

Neil R. Eisner,*** former General Counsel, US Department of Transportation

E. Donald Elliott,** Yale University and former General Counsel, Environmental Protection Agency

Adam M. Finkel,*** University of Michigan and University of Pennsylvania

Burnell C. Fischer,*** Indiana University

Arthur G. Fraas,*** Resources for the Future

Howard J. Feldman,** American Petroleum Institute

James L. Gattuso,** Heritage Foundation

James Goodwin,** Center for Progressive Reform

C. Boyden Gray,** former White House General Counsel to President George Herbert Walker Bush and US Ambassador to the European Union

James K. Hammitt,*** Harvard School of Public Health

Karen Harned,** National Federation of Independent Business

Devin Hartman,** Electricity Consumers Resource Council

Patrick Hedren,** National Association of Manufacturers

Sally Katzen,** New York University and former OIRA Administrator under President Bill Clinton

Michael A. Livermore,*** University of Virginia

Janet G. McCabe,*** Indiana University and former Acting Assistant Administrator for the Office of Air and Radiation at the United States Environmental Protection Agency under President Barack Obama

Richard D. Morgenstern,*** Resources for the Future

Richard J. Pierce, Jr.** George Washington University

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Paul Schlegel,** American Farm Bureau Federation

Stuart Shapiro,** Rutgers University

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