



**Testimony of**

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**Examining the Use of Agency Regulatory Guidance, Part II**

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The Competitive Enterprise Institute (CEI) is a non-profit public policy research organization dedicated to advancing individual liberty and free enterprise with an emphasis on regulatory policy. We appreciate the opportunity to discuss issues surrounding agency guidance, and thank Mr. Chairman Lankford, Ranking Member Heitkamp, and Members of the Subcommittee.

## **Executive Summary**

Congress passes and the president signs a few dozen laws every year. Meanwhile, federal departments and agencies issue well over 3,000 “legislative rules” and regulations of varying significance. A weekday never passes without new regulation. Yet beyond those rules, Congress lacks and must acquire a clear grasp on the amount and cost of the many thousands of executive branch and federal agency proclamations and issuances, including guidance documents, memoranda, bulletins, circulars, and letters with practical if not always technically legally binding regulatory effect. There are hundreds of “significant” agency guidance documents now in effect, plus many thousands of other such documents that are subject to little scrutiny or democratic accountability.

The Administrative Procedure Act (APA) of 1946 established the process of public notice for proposed rulemakings, and provided the opportunity for public input and comment before a final rule is published in the *Federal Register*, and a 30-day period before it becomes effective. But the APA’s requirement of publishing a notice of proposed rulemaking and allowing public comment does not apply to “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”

In addition to non-congressional lawmaking, the executive branch sometimes declines to enforce laws passed by Congress. Most prominent recently was the July 2013 Treasury Department’s unilateral delay, first by blog post, then by IRS guidance, of the Affordable Care Act’s (ACA) employer mandate and its accompanying tax penalty for non-compliance. Then came the November 2013 declaration—first by the president during a news conference and subsequently in Department of Health and Human Services guidance material—that insurers could continue to sell non-ACA compliant health policies.

It has long been the case that there are far more regulations than laws. That is troublesome enough. But with tens of thousands of agency proclamations annually, agencies may articulate interpretations and pressure regulated parties to comply without an actual formal regulation or understanding of costs. No one knows how much the regulatory state “weighs,” or even the number of agencies at the center of our own bureaucratic “big bang.” But for We, the Regulated, ignorance of the law is no excuse;

The upshot of such “regulatory dark matter” is that, without Congress actually passing a law or an APA-compliant legislative rule or regulation being issued, the federal government increasingly injects itself into our state, our community, and our personal lives. This testimony is a preliminary effort at outlining the scope of this phenomenon.<sup>1</sup> It concludes with steps for Congress to address dark matter and to address the over-delegation of legislative power that has permitted it.

## Introduction: From Rule of Law to Rule by...Whatever

*I've got a pen and I've got a phone. And that's all I need.*<sup>2</sup>

—President Barack Obama, to applause from the U.S. Conference of Mayors

*If the ruling power in America possessed both these means of government and enjoyed not only the right to issue orders of all kinds but also the capability and habit of carrying out those orders; if it not only laid down general principles of government but also concerned itself with the details of applying those principles; and if it dealt not only with the country's major interests but also descended to the limit of individual interests, then liberty would soon be banished from the New World.*

—Alexis de Tocqueville, *Democracy In America*

Astrophysicists have concluded that ordinary visible matter—the Sun, the Moon, the planets, the Milky Way, the multitudes of galaxies beyond our own, and their trillions of component stars, planets, and gas clouds—make up only a tiny fraction of the universe. How tiny a fraction? Less than 5 percent. Instead, dark matter and dark energy make up most of the universe, rendering the bulk of existence beyond our ability to directly observe.<sup>3</sup>

Here on Earth, in the United States, where the government spends \$4 trillion annually and regulatory compliance and economic intervention cost nearly half again that amount, there is also “regulatory dark matter” that is hard to detect, much less measure.

Congress passes a few dozen public laws from every year, but federal agencies issue several thousand “legislative rules” and regulations. The post-New Deal Administrative Procedure Act (APA) of 1946 established the process of public notice for proposed rulemakings, and provided the opportunity for public input and comment before a final rule is published in the *Federal Register*, and a 30-day period before it becomes effective.<sup>4</sup> So, we have ordinary public laws on the one hand, and ordinary allegedly above-board, costed out and commented-upon regulation on the other. But the APA's requirement of publishing a notice of proposed rulemaking and allowing public comment does not apply to “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”<sup>5</sup> There are varying degrees of both clarity of language and adherence to rule of law for pronouncements that may bind or change behavior:

(1) When issuing rules and regulations, agencies are legally required to adhere to the APA and subsequent strengthening legislation, but many do not. Further, most regulations' costs and benefits are unknown, so even much of the ostensibly APA-compliant body of rulemaking lacks transparency.

(2) “Dark matter” such as agency and presidential memoranda, guidance documents (“non-legislative” or interpretive rules), notices, bulletins, directives, news releases, letters, and even blog posts may enact policy while flouting the APA's public notice and comment requirements for legislative rules.<sup>6</sup> They also can escape judicial review. Agencies and bureaus sometimes regulate without writing down anything. Explicit or veiled<sup>7</sup> threats achieve this, as can adverse publicity, whereby an agency issues unfavorable news releases to force compliance from private parties, who are left with no recourse to the courts.<sup>8</sup>

“Sub rosa” regulation has long been an issue, and scholars have studied it extensively. In his 1989 book, *Regulation and the Reagan Era*, economist Robert A Rogowski explained:<sup>9</sup>

Regulatory bureaucracies are able to accomplish their goals outside the realm of formal rulemaking....An impressive underground regulatory infrastructure thrives on investigations, inquiries, threatened legal actions, and negotiated settlements. ... Many of the most questionable regulatory actions are imposed in this way, most of which escape the scrutiny of the public, Congress, and even the regulatory watchdogs in the executive branch.

Agency guidance documents and directives do not go through ordinary APA processes and are technically supposed to be non-binding, but one ignores them at peril. As the D.C. Circuit famously noted in the 2000 case, *Appalachian Power Co. v. Environmental Protection Agency*:

Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in regulations. One guidance document may yield another and then another and so on. ...Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.<sup>10</sup>

The upshot of regulatory dark matter is that, without Congress actually passing a law or a “normal” APA-compliant legislative rule or regulation being issued, the federal government increasingly injects itself into our state, our community, and our personal lives on matters such as health care, retirement, labor policy, education policy and funding, finance, critical infrastructure, land access and usage, resource management, science and research funding, energy policy, and frontier manufacturing and technology.

In addition to non-congressional lawmaking, the executive branch often declines to enforce laws passed by Congress. Most prominent recently was the July 2013 Treasury Department’s unilateral delay, first by blog post, then by IRS guidance, of the Affordable Care Act’s employer mandate and its accompanying tax penalty for non-compliance.<sup>11</sup> Then came the November 2013 declaration, first by the president during a news conference and subsequently in Department of Health and Human Services guidance material, that insurers could continue to sell non-ACA compliant health policies.<sup>12</sup> Similarly, the Department of Homeland Security’s policy, “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents,” was announced in an internal agency memorandum.<sup>13</sup>

President Obama’s apparent disdain for Congress has brought about a dark matter apex of sorts. As he said in 2011:<sup>14</sup>

I’ve told my administration to keep looking every single day for actions we can take without Congress. ... And we’re going to be announcing these executive actions on a regular basis.

That stance was reiterated during President Obama's 2014 State of the Union Address, when he pledged to implement a "year of action," with or without Congress.<sup>15</sup> Agency officials have largely gone along in this aggressive off-the-books rulemaking. "One of the ways that the White House plays a role is to think forward and challenge the agencies to be proactive in saying, 'What more can we do? And what more can we do that's consistent with certain themes?'" explained Obama adviser Brian Deese to *USA Today*.<sup>16</sup> *USA Today* also tallied an increase in "fact sheets" highlighting new agency initiatives during the course of the administration, of which there were 224 in 2014, more than the administration's first three years combined.<sup>17</sup> While President Obama has experienced some backlash over his exercise of executive power, the current dynamic in Washington is still one of Congress responding to the president's legislative agenda rather than the president responding to Congress.<sup>18</sup>

The president is not wholly to blame, though. Congress' over-delegation of its own authority has undermined checks and balances and the principle of separation of powers. Our government's branches seem not to so much to check-and-balance as to leapfrog one another, to ratchet the growth of government upward rather than constrain it to a constitutionally limited role. Cronyism is one thing, but the annihilation of rule of law and its replacement with officials' whim is the essence of usurpation and ultimately tyranny. When representative lawmaking gets delegated to untethered bureaucrats, the decrees of those autonomous administrators can eventually outweigh normal lawmaking as regulatory dark matter expands. As Congress shirks, the presidential "pen and phone" become easier to deploy.

From federal agency regulations on Internet neutrality<sup>19</sup> to health care overhaul to renewable energy power plans that Congress itself rejected when recorded votes mattered,<sup>20</sup> one gets the distinct impression that some in power see the private sector as optional. The rise of dark matter indicates many see the Constitution as optional as well.

## **The Unknown Number of Federal Agencies Issuing Rules**

As bureaucracy sprawls,<sup>21</sup> no one can say with complete authority exactly how many federal agencies exist. The twice-annual *Unified Agenda of Federal Deregulatory and Regulatory Actions*, which compiles agency regulatory plans in the federal pipeline, listed 60 agencies in the Spring 2015 edition,<sup>22</sup> a count that can vary slightly from report to report. The fall 2014 edition, which also contained many agencies' so-called Regulatory Plan, also listed 60.

However, in recent years, the once-routine *Unified Agenda's* April-and-October schedule appears to be a thing of the past, as it has been published late or failed to appear at all, as in Spring 2012. Moreover, the Draft 2015 *Report to Congress on the Benefits and Costs of Federal Regulations*, which usually appears by April at the latest, was the latest ever, appearing on October 16.<sup>23</sup> The previous latest various were those straddling the two Bush/Obama transition years.<sup>24</sup> So transparency of the bureaucracy is an issue in more ways than one.

The Administrative Conference of the United States lists 115 agencies in the appendix of its "Sourcebook of United States Executive Agencies,"<sup>25</sup> but notes:<sup>26</sup>

[T]here is no authoritative list of government agencies. For example, FOIA.gov [maintained by the Department of Justice] lists 78 independent executive agencies and 174 components of the executive departments as units that comply with the Freedom of Information Act requirements imposed on every federal agency. This appears to be on the conservative end of the range of possible agency definitions. The United States Government Manual lists 96 independent executive units and 220 components of the executive departments. An even more inclusive listing comes from USA.gov, which lists 137 independent executive agencies and 268 units in the Cabinet.

In a 2015 Senate Judiciary Committee hearing, Chairman Chuck Grassley (R-IA) noted: “The Federal Register indicates there are over 430 departments, agencies, and sub-agencies in the federal government.”<sup>27</sup> The Senator apparently was citing the Federal Register Agency List, which depicts 438 agencies as of this writing.<sup>28</sup> The online Federal Register Index depicts 257.<sup>29</sup> Table 1 summarizes various tallies.

**Table 1. How Many Federal Agencies Exist?**

Unified Agenda:	60
Administrative Conference of the United States	115
FOIA.gov (at Department of Justice)	252
Federal Register Index page	257
Regulations.gov <sup>30</sup>	289
United States Government Manual	316
Federal Register Agency List page	438

If nobody knows how many agencies exist by whose decrees we must abide, that means we do not know how many people work for the government (let alone contractors making a living from taxpayers) nor how many rules there really are. But even when we isolate a given, knowable agency, it may be hard to tell exactly what is and is not a rule. That, plus the growing concern that issuing a rule may not even be necessary to achieve bureaucratic ends, call out for congressional response. But let us start with what we do (think we) know about agency rules.

### **How Many Rules Do Federal Agencies Issue That We Know About?**

Much binding law comes from agencies rather than elected lawmakers. Federal departments, agencies, and commissions issued 3,410 rules in 2015, while Congress passed and the president signed 115 bills into law—a ratio of 30 rules for every law.<sup>31</sup> The average has been 26 rules for every law over the past decade as Table 2 indicates. The rules issued in a given year are typically not substantively related to the current year’s laws, since agency output represents ongoing implementation of earlier legislation. So far in 2016, agencies have issued 1,634 rules, as of June 22, 2016. Looking back, there have been 86,680 rules since 1995.

Another 2,342 proposed rules appeared in 2015 and are under agency consideration. So far in 2016, agencies have issued 1,172 additional proposed rules (as of June 22).

**Table 2. Public Laws vs. Agency Rules by Category**

<b>Year</b>	<b>Public Laws</b>	<b>Total Rules</b>	<b>Econ. Signif. Rules</b>	<b>Major Rules (GAO)</b>	<b>Signif. Rules</b>
1995	88	4,713			
1996	246	4,973		42	308
1997	153	4,584		46	268
1998	241	4,899	27	76	242
1999	170	4,684	41	51	231
2000	410	4,313	35	77	288
2001	108	4,132	75	70	295
2002	269	4,167	38	51	284
2003	198	4,148	38	50	336
2004	299	4,101	40	66	321
2005	161	3,975	48	56	258
2006	321	3,718	48	56	163
2007	188	3,595	41	61	180
2008	285	3,830	62	95	427
2009	125	3,503	70	84	371
2010	217	3,573	81	100	420
2011	81	3,807	79	80	444
2012	127	3,708	57	68	347
2013	72	3,659	51	81	331
2014	224	3,554	69	81	290
2015	115	3,410	61	76	302
2016*	62	1,634	36	33	130
<b>TOTALS:</b>	<b>4,160</b>	<b>86,680</b>	<b>997</b>	<b>1400</b>	<b>6236</b>

\*As of 6/22/2016

Sources: Public Laws: Government Printing Office; Total Rules and Significant Rules: author search on FederalRegister.gov advanced search function, economically significant rules; Unified Agenda of Federal Regulations search on RegInfo.gov; Major Rules: Government Accountability Office. *Figures updated at www.tenthousandcommandments.com.*

As Table 2 also shows, a few dozen rules are characterized as “major,” “economically significant” or “significant.” There are differences between these defined in law and executive orders, but the usual characterization is of at least \$100 million in annual economic impact.<sup>32</sup> Notably, “significant” regulatory actions regularly exceed the number of duly enacted laws.

### **Even When We Can Measure Ordinary Regulatory Matter, Public Protections Lag**

*[A]s more goals are pursued through rules and regulations mandating private outlays rather than through direct government expenditures, the Federal budget is an increasingly inadequate measure of the resources directed by government toward social ends.<sup>33</sup>*

One problem with simply bringing guidance under the Administrative Procedure Act is that even normal rules aren't getting the treatment they deserve under the APA.

We are supposed to be bound solely by laws enacted by Congress and signed by the president, but things do not quite work out that way. Theoretically, thousands of federal agency rules receive scrutiny under the Administrative Procedure Act. Proposed rules are issued, and the public is supposed to get ample time to comment before final rules are published and become binding. Laws amending the APA have sought to subject complex and expensive rules to additional analysis. These reforms include the Paperwork Reduction Act of 1980,<sup>34</sup> the Regulatory Flexibility Act (to address small business impacts),<sup>35</sup> and the Congressional Review Act (CRA), which enables Congress to vote on a resolution of disapproval to reject agency regulations.<sup>36</sup> In addition, various presidential executive orders govern central review of rules by the Office of Management and Budget (OMB) and address cost-benefit analysis for some rules.<sup>37</sup> Regulatory dark matter can escape these requirements.

To put the dark matter discussion into context, we should note shortcomings in oversight of the ordinary, everyday rules and regulations.

*First*, the central review process at the Office of Management and Budget set up by President Ronald Reagan's Executive Order 12291<sup>38</sup> (as well as subsequent executive orders from other presidents) to assure rule benefits exceed costs is incomplete.<sup>39</sup> President Bill Clinton's 1993 Executive Order No. 12866 eased off the heavier OMB oversight of the Reagan order in that it sought "to reaffirm the primacy of Federal agencies in the regulatory decision-making process."<sup>40</sup> The process was never thorough—it incorporated only executive agencies, not independent agencies—but today central review captures only a fraction of rulemaking.

During calendar year 2014, when 3,554 rules were finalized by 60 federal departments, agencies, and commissions, OMB's 2015 *Report to Congress* (covering fiscal year 2014) reviewed a few hundred significant rules, and 54 major rules—but presented net-benefit analysis for only 13.<sup>41</sup> Notably, the Draft 2016 report is not yet available. Apart from listing some of their major rules, OMB completely ignores independent agencies, some of which are highly influential, such as the Federal Communications Commission and the several bodies implementing and enforcing the Dodd-Frank law. Table 3 compares OMB reviews with the total final rule count in the *Federal Register* over recent years. Overall, the OMB has reviewed just 160 rules since 2001 that happened to incorporate both cost and benefit analysis, and another 86 with cost analysis. While these thousands of rules are all subject to APA, much is "dark matter" in its own right, in the sense that we know little about costs, benefits, and burdens.

**Table 3. Major Executive Agency Rules Reviewed by OMB**

<b>Year</b>	<b>Rules with both costs and benefits</b>	<b>Rules with costs only</b>	<b>Grand total, rules with costs</b>	<b>Federal Register final rules</b>
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<b>2001</b>	14	13	27	4,132
<b>2002</b>	3	0	3	4,167
<b>2003</b>	6	4	10	4,148
<b>2004</b>	11	7	18	4,101
<b>2005</b>	13	2	15	3,943
<b>2006</b>	7	1	8	3,718
<b>2007</b>	12	4	16	3,995
<b>2008</b>	13	6	19	3,830
<b>2009</b>	16	12	28	3,503
<b>2010</b>	18	8	26	3,573
<b>2011</b>	13	6	19	3,807
<b>2012</b>	14	9	23	3,708
<b>2013</b>	7	11	18	3,659
<b>2014</b>	<b>13</b>	<b>3</b>	<b>16</b>	<b>3,554</b>
<b>TOTALS</b>	<b>160</b>	<b>86</b>	<b>246</b>	<b>53,838</b>

Sources: Costed rule counts, OMB, *2015 Report to Congress* on regulatory costs, Federal Register Final Rules: author search on FederalRegister.gov advanced search function

**Second**, the APA process is broken in that agencies fail to issue a Notice of Proposed Rulemaking for a substantial portion of their rules.<sup>42</sup> According to a Government Accountability Office (GAO) report:<sup>43</sup>

Agencies did not publish a notice of proposed rulemaking (NPRM), enabling the public to comment on a proposed rule, for about 35 percent of major rules and about 44 percent of nonmajor rules published during 2003 through 2010.

Agencies often cite the APA’s “good cause” exemption,<sup>44</sup> which in GAO’s sample agencies used “for 77 percent of major rules and 61 percent of non-major rules published without an NPRM.”<sup>45</sup> Yet, the sky is rarely falling in a way that requires such haste. Rather, agencies too often act as if it is practical, necessary, and in the public interest to bypass Congress and make law unilaterally, compounding the breakdown in accountability embodied in delegation itself.

In their defense, agencies tend to ask for public comments more often than not on final rules for which they had never issued a notice of proposed rulemaking. But that gesture is too little too late since, as GAO notes, “the public does not have an opportunity to comment before the rule’s issuance, nor is the agency obligated to respond to comments it has received.”<sup>46</sup> Reports like the GAO survey appear, and nothing happens to rectify things.

**Third**, Congress rarely uses its most powerful accountability tool, the Congressional Review Act, to pass resolutions of disapproval (RODs) of costly or controversial agency rules. With spotty public notice and inadequate accountability, it is imperative that Congress frequently go on record via such resolutions to push back against agency overreach. The Regulations from the Executive In Need of Scrutiny (REINS) Act, which has passed the House of Representatives but not yet the Senate, would build on the CRA by creating a requirement akin to an affirmative CRA-style resolution. Under the REINS Act, no major rule—costing \$100 million or more annually—could become effective until Congress explicitly approved it.<sup>47</sup> This is a principle that also should apply to dark matter like agency guidance documents and memoranda.

*Fourth*, even if Congress were inclined to aggressively impose authority, the CRA itself is further undermined by agency lapses. As Curtis W. Copeland found in a white paper prepared for the Administrative Conference of the United States, many final rules are no longer properly submitted by agencies to the GAO’s Comptroller General (CG) and to Congress, as required under the CRA.<sup>48</sup>

That submission is indispensable, since Congress awaits reports to issue a resolution of disapproval in the first place. By failing to submit rules, Copeland notes, “the rulemaking agencies have arguably limited Congress’ ability to use the expedited disapproval authority that it granted itself with the enactment of the CRA.”<sup>49</sup> Congress in a sense lacks the raw material it needs to even contemplate a resolution of disapproval. Remedies for this include passing REINS or automating RODs on every final rule.

Technically, the CRA already applies to agency actions like guidance that are ostensibly not formal rules. In a 1999 *Administrative Law Review* article, Morton Rosenberg of the Congressional Research Service describes legislative history that shows that the scope of the CRA extends beyond agency rules. Rather, noted Rosenberg, the CRA “intentionally adopted the broadest possible definition of the term ‘rule’ when it incorporated the APA’s definition,” and was “meant to encompass all substantive rulemaking documents—such as policy statements, guidances, manuals, circulars, memoranda, bulletins and the like—which as a legal *or* practical matter an agency wishes to make binding on the affected public.”<sup>50</sup> The CRA’s framers recognized the phenomenon of agency strategic avoidance of APA. As Rosenberg notes:

The framers of the legislation indicated their awareness of the now widespread practice of agencies avoiding the notification and public participation requirements of APA notice-and-comment rulemaking by utilizing the issuance of other, non-legislative documents as a means of binding the public, either legally or practically, and noted that it was the intent of the legislation to subject just such documents to scrutiny.<sup>51</sup>

The regulatory bureaucracy is not the only place Washington’s attitude toward the public is to conceal rather than disclose. Misleading unemployment and GDP statistics are often cited to justify increased government spending.<sup>52</sup> Recent news headlines report on inadequate responses by agencies to Freedom of Information Requests, the use of private email for official business, and loss of government emails.<sup>53</sup> Reporters describe difficulty in accessing federal data.<sup>54</sup> We even find claims in the water-flows-uphill category to justify rulemaking: that switching from fossil energy to more expensive and less reliable “alternative” sources of electricity saves money,<sup>55</sup> that adding regulations creates jobs and growth,<sup>56</sup> that minimum wages do not decrease employment,<sup>57</sup> and that forcing companies to pay expand overtime pay helps to grow the middle class.<sup>58</sup>

Modern government sports a pen and phone but also a cloak and a lock, even as it calls itself the “most transparent administration in history.”<sup>59</sup> Administrative regulations that ostensibly are subject to notice and comment already do not get appropriate supervision; that makes dark matter, although most assuredly not a new phenomenon, more of a concern in the modern era.

## A Partial Inventory of Regulatory Dark Matter

*The champions of socialism call themselves progressives, but they recommend a system which is characterized by rigid observance of routine and by a resistance to every kind of improvement. They call themselves liberals, but they are intent upon abolishing liberty. They call themselves democrats, but they yearn for dictatorship. They call themselves revolutionaries, but they want to make the government omnipotent. They promise the blessings of the Garden of Eden, but they plan to transform the world into a gigantic post office. Every man but one a subordinate clerk in a bureau.*

— Ludwig von Mises, *Bureaucracy* (1944)

We can count agency proposed and final rules, and even executive orders and memos, but agency memos, guidance documents, bulletins, and other dark matter are more difficult to broadly grasp and measure. And there is a *lot* of it.

Over-delegation by Congress and non-compliance with the Administrative Procedure Act by agencies are bad enough. But the inability and disinclination to discipline ordinary regulation via the tools purportedly created specifically to ensure that self-restraint—including APA notice-and-comment and OMB central review—is exacerbated by the presence of regulatory dark matter, which escapes constraint. Regulatory compliance costs are often referred to as a hidden tax, but dark matter occupies a class by itself with its lack of disclosure, supervision, and transparency.<sup>60</sup> Guidance documents, presidential and agency memoranda, and notices and bulletins with legal effect can skirt nearly everything: the constitutional lawmaking process, the APA’s notice-and-comment requirements, and federal OMB review. As DePaul University law professor David L. Franklin notes: “The distinction between what is binding regulation and what is exempt from notice and comment has been called ‘tenuous,’ ‘baffling,’ and ‘enshrouded in considerable smog.’”<sup>61</sup>

What follows represents an initial stab at tallying a snapshot of regulatory dark matter. While not all of these are prescriptive regulations, the cumulative effect of the policy making dark matter is highly significant and burdensome. The bottom line: Our elected Congress needs to reassert its constitutional authority over what rules legitimately affect the public.

### ***Executive Orders***

*And though we sung his fame  
We all went hungry just the same*

—Steely Dan

“Kings,” on the album *Can’t Buy a Thrill*.

A song about the transition from Richard the Lionheart to King John, prior to the Magna Carta.

*We’ll do audacious executive action throughout the course of the year—I’m confident about that.... We’re going to lean pretty hard into it.*<sup>62</sup>

—White House Chief of Staff Denis McDonough

The use of executive orders (EOs) is nothing new historically, dating back to George Washington’s administration.<sup>63</sup> They are not strictly dark matter, but they contribute to policy being implemented without Congress doing so explicitly, and they anchor the broader discussion over executive branch power. Executive orders’ realm is that of the internal workings and operations of the federal government. While technically orders affect just the current administration and subsequent presidents can overturn them, the complexity of overturning them grows as Washington intervenes into more private spheres of activity. For example, President Obama’s executive order for a minimum wage for federal contractors,<sup>64</sup> a Non-Retaliation for Disclosure of Compensation Information decree,<sup>65</sup> and an executive order on paid sick leave for federal contractors will reverberate for years among private firms that deal with the government.<sup>66</sup> The same is true for orders on cybersecurity information sharing<sup>67</sup> and sanctions on individuals allegedly engaged in malicious cyber activity,<sup>68</sup> both of which are controversial not only because of their potential effects on privacy, but also for their not having been passed by Congress.<sup>69</sup> Other Obama EOs have addressed matters internal to executive operations, such as blocking accounts of Russian authorities believed responsible for the Ukrainian crisis.<sup>70</sup>

Pen and phone notwithstanding, Obama is far from an EO record-holder. He is no match for Franklin Delano Roosevelt’s 3,467 executive orders, among them the seizure of gold.<sup>71</sup> And unlike Harry Truman, he has not attempted to seize steel mills.<sup>72</sup> As of June 22, 2016, President Obama had issued 259 executive orders in total during his entire administration, and he has issued 17 so far in 2016.<sup>73</sup>

Executive orders numbered in the single digits or teens until Abraham Lincoln and the subsequent reconstruction period. The Ulysses S. Grant administration issued 217, then a record.<sup>74</sup> Beginning in the 20th century, orders topped 100 for each presidential term and sometimes numbered in the thousands (again, FDR). The total since the nation’s founding exceeds 15,000.<sup>75</sup> Table 4 lists executive orders issued over the past two decades, showing 800 since 1994 according to the *Federal Register* office; the Obama White House lists significant executive orders separately.<sup>76</sup>

**Table 4. Number of Executive Orders**

<b>Year</b>	<b>Federal Register Database</b>	<b>White House Tally</b>
1995	40	
1996	50	
1997	38	
1998	38	
1999	35	
2000	39	
2001	67	
2002	32	
2003	41	
2004	46	
2005	27	

2006	25	
2007	32	
2008	29	
2009	44	39
2010	41	38
2011	33	36
2012	39	39
2013	24	19
2014	34	29
2015	29	24
2016*	17	15
<b>TOTALS:</b>	<b>800</b>	<b>239</b>

As of 6/22/2016

Blanks are not available at source or database

Sources: Author search on FederalRegister.gov advanced search function; Presidential Documents; White House Press Office. *Figures updated at www.tenthousandcommandments.com.*

Whether lengthy or brief, orders and memoranda can have significant impacts for or against liberty—a smaller number does not necessarily mean small effects. Like the *Federal Register*, or the numbers of final rules, tallies are interesting but do not tell the whole story in and of themselves. The pertinent question is what executive orders and memoranda—and the ones to come now that the pen and phone are unleashed—are used for and what they *do*. Executive actions can expand governmental power, or they can liberalize and enhance freedom (think Lincoln’s Emancipation Proclamation). Obama’s Executive Order No. 13563 concerning “Improving Regulation and Regulatory Review” was a pledge to streamline regulation; however it has so far amounted to a few billion dollars in cuts that were swamped by other rules issued.<sup>77</sup> In all, four of Obama’s executive orders address regulatory liberalization and reform, but their effectiveness has been limited.<sup>78</sup>

Notable recently on the regulatory front was the executive order “Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy.”<sup>79</sup> This action proposes interventionist policies and seemed an attempt to blame anti-competitive practices, not on the regulatory state and the executive branch’s own overreach with the “pen and phone,” but on private sector actors.<sup>80</sup> The order was inappropriately positive toward telecommunications and antitrust regulation.

Some executive activity that transpires today appears without precedent. *The Washington Post* characterized Obama’s unilateral executive action on immigration as one that “flies in the face of congressional intent—no matter how indefensible that intent looks.”<sup>81</sup> More notable from the “dark matter” perspective is that the president never actually signed such an executive order, and the Department of Homeland Security never published a rule in the *Federal Register*. Rather, a memorandum was issued by Homeland Security Secretary Jeh Johnson.<sup>82</sup>

### ***Executive Memoranda***

*USA Today* calls presidential memoranda “[e]xecutive orders by another name” that are “not numbered” and “not indexed.”<sup>83</sup> Memoranda are hard to count, because they may or may not be

published, depending on the administration’s own determination of “general applicability and legal effect.”<sup>84</sup>

While presidential memoranda are not new, their quantity has grown significantly in recent years. President Obama’s pace tops that of George W. Bush’s presidency. Bush issued 131 memos that were published in the *Federal Register* over his entire presidency,<sup>85</sup> while Obama issued 232 as of June 22, 2016, with another year to go.<sup>86</sup> As noted, not all memoranda get published in the *Federal Register*. Some may appear on the White House press office’s Web page.<sup>87</sup> Indeed, the Obama White House tally is significantly higher than what gets published in the *Federal Register*. Table 5 shows both tallies.

**Table 5. Number of Presidential Memoranda**

<b>Year</b>	<b>Federal Register Database</b>	<b>White House Tally</b>	<b>Rules with Both Costs and Benefits</b>	<b>Economically Significant Rules</b>
2000	13			35
2001	12		14	75
2002	10		3	38
2003	14		6	38
2004	21		11	40
2005	23		13	48
2006	18		7	48
2007	16		12	41
2008	15		13	62
2009	38	68	16	70
2010	42	70	18	81
2011	19	85	13	79
2012	32	85	14	57
2013	32	52	7	51
2014	25	45	13	69
2015	31	72		61
2016*	16	52		36
<b>TOTALS:</b>	<b>377</b>	<b>529</b>		

\*As of 6/22 2016; Blanks are not available at source or database

Sources: Author search on FederalRegister.gov advanced search function, Presidential Documents; White House Press Office; Presidential Memoranda. *Figures updated at www.tenthousandcommandments.com.*

Not all memoranda have regulatory impact, but many do. In 2014, Obama memoranda did such things as create a new financial investment instrument and impose new requirements on government contractors regarding work hours and employment preferences. Note again that these are not laws passed by Congress. They are not regulations. They are not even executive orders. They are memos. Presidential memoranda “hereby direct” someone in the federal hierarchy to do something that often leads to new controls and larger government. They are also often aimed at government contractors, which spill over on the private sector or affect private

sector planning, and they remain in place unless a future president revokes them. Here are some recent examples among the count above that were documented in the *Federal Register*:

- Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment 11/03/2015.<sup>88</sup> According to a February 2016 House Natural Resources Subcommittee on Oversight and Investigations hearing memo, this directive, issued to five federal agencies and governing mitigation of resource impacts from permitting for projects and activities, “appears to create sweeping new statutory authority through unilateral executive action, and represents a substantial re-write of public land use and water policy....Many of the terms used in the Memorandum to describe resources requiring mitigation from projects—including ‘important,’ ‘scarce,’ ‘sensitive,’ and ‘irreplaceable,’ are not found in existing statutes and are largely undefined in the Memorandum. The vague and overbroad terms will likely lead to legal uncertainty for many currently permitted projects.”<sup>89</sup>
- Promoting Smart Gun Technology 01/04/2016
- Promoting Rehabilitation and Reintegration of Formerly Incarcerated Individuals 04/29/2016
- Unexpected Urgent Refugee and Migration Needs 01/13/2016
- Building National Capabilities for Long-Term Drought Resilience 03/21/2016
- Limiting the Use of Restrictive Housing by the Federal Government 03/01/2016
- Creating a Preference for Meat and Poultry Produced According to Responsible Antibiotic-Use Policies 06/01/2015
- Re-establishing Diplomatic Relations and Permanent Diplomatic Missions [with Cuba] 07/01/2015
- Expanding Broadband Deployment and Adoption by Addressing Regulatory Barriers and Encouraging Investment and Training 03/23/2015
- Student Aid Bill of Rights to Help Assure Affordable Loan Repayment 03/10/2015
- Establishment of the Cyber Threat Intelligence Integration Center 02/25/2015
- Promoting Economic Competitiveness while Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems 02/20/2015
- Expanding Federal Support for Predevelopment Activities for Nonfederal Domestic Infrastructure Assets 01/16/2015
- Modernizing Federal Leave Policies for Childbirth, Adoption, and Foster Care to Recruit and Retain Talent and Improve Productivity 01/15/2015
- Enhancing Workplace Flexibilities and Work-Life Programs 06/27/2014
- Helping Struggling Federal Student Loan Borrowers Manage Their Debt 06/12/2014
- Advancing Pay Equality through Compensation Data Collection 04/11/2014
- Updating and Modernizing Overtime Regulations 03/18/2014
- Creating and Expanding Ladders of Opportunity for Boys and Young Men of Color 03/07/2014
- Job-Driven Training for Workers 2/05/2014
- Enhancing Safeguards to Prevent the Undue Denial of Federal Employment Opportunities to the Unemployed and Those Facing Financial Difficulty through No Fault of Their Own 02/05/2014
- Retirement Savings Security 02/04/2014

- Establishing a White House Task Force to Protect Students From Sexual Assault 01/27/2014
- Establishing a Quadrennial Energy Review 01/14/2014

There are 3,500-plus rules and regulations annually, while OMB presents cost-benefit analyses for just a handful each year of the few hundred it reviews. OMB has reviewed just 160 rules with both cost and benefit analysis since 2001, and another 86 with cost analysis (Tables 3 and 5),

Interestingly, the number of presidential memoranda each year exceeds the numbers of “ordinary matter” rules with OMB-reviewed cost-benefit analyses (Tables 3 and 5). In other words, while administrations often emphasize the alleged “net benefits” of major rules,<sup>90</sup> those few are topped by the number of “mere” memoranda, many of which would appear to have significant impacts. Also interesting is that the number of memoranda, per the White House tally, can sometimes approach or even exceed that of completed economically significant rules (\$100 million in annual economic impact) published in the *Unified Agenda* (Tables 2 and 5).

### ***Agency Guidance Documents***

*Too often, however, agencies opt for short-cuts. Rather than bothering with the burdensome rule-making process, they use faster and more flexible means of imposing mandates. To avoid running afoul of the letter of the Administrative Procedure Act, these mandates are often couched in tentative, temporary or voluntary terms. Regardless of the language and the format, the effect is the same for regulated entities. The agency suggests that you do something — even if it says that it might suggest something different later — and you do it.<sup>91</sup>*

—Hester Peirce, Mercatus Center

If we do not measure agency rules well, we most assuredly do not measure agency guidance with anything approaching precision. As noted, the Administrative Procedure Act’s publishing requirement for proposed rulemaking does not apply to “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”<sup>92</sup> Such memos, bulletins, and letters can take up considerable space in the *Federal Register* and on agency websites. The problem is that agencies may issue instructions or new interpretations of existing regulations and pressure regulated parties into complying without issuing an actual formal regulation, much less an estimate of costs or burdens.

While purportedly not legally binding, guidance may be binding “as a practical matter,” as the late George Mason University law professor and chairman of the Administrative Conference of the United States Robert A. Anthony noted in a 1992 *Duke Law Journal* article, given that “failure to conform will bring adverse consequences, such as an enforcement action or denial of an application.”<sup>93</sup> Guidance documents may help agencies circumvent oversight, similar to the “good cause” exemption that already results in notices of proposed rulemaking not being issued for some formal rules. Agencies can also place conditions on their guidance in ways that make it hard to punish them—such as for example, the “contains nonbinding recommendations” caveat that appears throughout the Food and Drug Administration’s (FDA) guidance on “Distributing Scientific and Medical Publications on Unapproved New Uses—Recommended Practices.”<sup>94</sup>



As a July 2012 House Oversight and Government Reform Committee report explained:

Guidance documents, while not legally binding or technically enforceable, are supposed to be issued only to clarify regulations already on the books. However ... they are increasingly used to effect policy changes, and they often are as effective as regulations in changing behavior due to the weight agencies and the courts give them. Accordingly, job creators feel forced to comply.<sup>95</sup>

John Graham, former head of OMB's Office of Information and Regulatory Affairs (OIRA), and James Broughel of the Mercatus Center at George Mason University call this phenomenon "stealth regulation." They note:

[Guidance documents] Can have the same effects as a regulation adopted under the APA if regulated entities have no realistic choice but to comply with these agency directives. Moreover, agencies can change these directives without notice-and-comment, and because these documents are generally not published in the Code of Federal Regulations, compliance is more costly for firms that must survey an array of sources to determine how to maintain compliance.<sup>96</sup>

Guidance is pervasive. As University of Washington School of Law reference librarian Mary Wisner notes: "[T]he body of guidance documents (or non-legislative rules) is growing, both in volume and in importance."<sup>97</sup> This paper is an attempt to quantify this mass of sub-rosa regulation. Columbia University law professor Peter Strauss noted (in the same issue of *Duke Law Journal* as Anthony): "Federal Aviation Administration rules are two inches thick while corresponding guidance totals 40 feet; similarly, IRS rules consume a foot of space while supporting guidance documents total over 20 feet."<sup>98</sup>

Noting that the Congressional Review Act is applicable to guidance and other documents, not merely rules (but alas, has yet to be applied to them), Morton Rosenberg characterized high volume back in 1999. Since most of the material submitted to the Comptroller General per the CRA has been ordinary notice-and-comment regulation, Rosenberg maintained:

It is likely that virtually all the 15,000-plus non-major rules thus far reported to the [Comptroller General] have been either notice-and-comment rules or agency documents required to be published in the Federal Register. This would mean that perhaps thousands of covered rules have not been submitted for review. Pinning down a concrete number is difficult since such covered documents are rarely, if ever, published in the *Federal Register*, and thus will come to the attention of committees or members only serendipitously.<sup>99</sup>

Even in the face of such volume, some dispute the notion that recent guidance is meant to circumvent Congress. Connor N. Raso in the *Yale Law Journal* contends that "agencies do not frequently use guidance documents to avoid the rulemaking process."<sup>100</sup> Raso argues that concerns over guidance are overblown, because the amount of significant guidance documents issued is low compared to APA rules, and agency heads rarely reverse predecessors' guidance.

However, the expansive modern regulatory state is a bipartisan phenomenon and there is no good reason to believe that either party would remove very much guidance upon a change in administration.

Moreover, officially “significant” guidance documents may not capture the extent of guidance that is, in fact, significant. Ohio State law professor Peter Shane defends Raso’s article and the guidance-propelled regulatory state itself by asking, “Might the Motivation for Agency Guidance be the Public’s Need for Guidance?”<sup>101</sup> But that gets it backward. If thousands of regulations and directives were not a fact of life, there would exist less of a “need.” As the economics writer Henry Hazlitt noted: “[I]f the government confined itself to enacting a code of laws simply intended to prevent mutual aggression and to maintain peace and order, it is hard to see how such a code would run into any great number of laws.”<sup>102</sup>

Congress has taken an interest in getting clarity on how agencies use guidance and whether agencies regard it as binding, and if so, securing public comment as is done for formal rules.<sup>103</sup> In May 2015, Sens. Lamar Alexander (R-Tenn.) and James Lankford (R-Okla.) sent letters to the Departments of Labor, Education, and Health and Human Services, and the Equal Employment Opportunity Commission, stating, “We are concerned that agencies may be issuing guidance to avoid regulatory requirements,” and requesting:<sup>104</sup>

- 1) A list of all guidance issued on or after July 24, 2007, that have been the subject of a complaint that DOL is not following the procedures outlined in OMB’s Final Bulletin for Agency Good Guidance Practices.
- 2) A list of all guidance issued on or after July 24, 2007, that have been the subject of a complaint that DOL is improperly treating a guidance document as a binding requirement.
- 3) A list of all guidance, including guidance not deemed significant, issued on or after July 24, 2007, that have been the subject of a complaint or written comments that DOL should have engaged in APA notice and comment rulemaking instead of issuing guidance.
- 4) Provide the complaints or written comments and all documents and communications referring or relating to the complaints or written comments referenced in requests one through three.
- 5) A list of guidance issued on or after July 24, 2007, that has been overturned by a court of law, including guidance that has been overturned in which an appeal is pending.
- 6) From July 24, 2007, to present, all documents and communications referring or relating to a decision to issue guidance on a topic instead of proceeding with notice and comment rulemaking under the APA.
- 7) The number of guidance documents issued on or after July 24, 2007, broken down by year, sub-agency, and whether or not the guidance is significant.
- 8) A list of all guidance currently in draft form and the date the draft was issued.
- 9) A list of all guidance that has been withdrawn on or after July 24, 2007.

Concern over bypassing the rulemaking process continues, and similar detail from all agencies would be useful. A September 29, 2015 letter by these and other Senators to the Department of Labor requested withdrawal of three costly recent guidance documents from the Occupational

Safety and Health Administration and asked that the Department pursue the changes “only through the rulemaking process.”<sup>105</sup> In the interim, the Homeland Security and Government Affairs Committee held a hearing on September 23, 2015, “Examining the Use of Agency Regulatory Guidance” featuring representatives from the Departments of Labor and Education.<sup>106</sup> The Government Accountability Office was also on hand to provide testimony on how agencies can strengthen internal controls on guidance documents.<sup>107</sup> Members expressed concern that agencies short-circuit the ordinary rulemaking process and issue guidance when they ought to be issuing formal rulemaking per the Administrative Procedure Act, and that the means by which an agency initiative becomes a rule on the one hand or a guidance on the other is a “black box” that evades Congressional scrutiny.<sup>108</sup>

Guidance documents are subject to CRA review and resolutions of disapproval, but have not been deeply scrutinized in this manner—a clear instance of Congress failing to live up to its oversight duties. Granted, there are instances of agencies performing retrospective review of some of their own guidance documents, but there is little OMB review of how agencies certify those results.<sup>109</sup> Moreover, what constitutes “notice” is unclear. For example, Richard Williams and James Broughel of the Mercatus Center note that of 444 FDA guidance documents issued since 2007, only one notice was reviewed by OMB, and that OMB “is vague as to what documents are included in its ‘notice’ category, saying only that these are documents that announce new programs or agency policies, which presumably includes guidance documents.”<sup>110</sup>

**Alongside the aforementioned waivers of provisions of the Patient Protection and Affordable Care Act, prominent recent executive and independent agency guidance documents include:**

- **Housing and Urban Development** guidance decreeing landlord and home seller denial of those with criminal records a potential violation of the Fair Housing Act,<sup>111</sup>
- The **Environmental Protection Agency’s** (EPA’s) Clean Water Act interpretive guidance on “Waters of the United States.”<sup>112</sup> This directive took the step of soliciting notice and comment per the APA, though with significant controversy over manufactured endorsement;<sup>113</sup>
- The **Securities and Exchange Commission’s** interpretive “Commission Guidance Regarding Disclosure Related to Climate Change,” on disclosing potential disruption from “significant physical effects of climate change” on “a registrant’s operations and results,” and disclosing international community actions that “can have a material impact on companies that report with the Commission.”<sup>114</sup> The guidance observes that “Many companies are providing information to their peers and to the public about their carbon footprints and their efforts to reduce them” that hints at where matters are headed as likely emphasis moves from actions affecting a company to how a company allegedly affects others.
- **Commodity Futures Trading Commission** “Staff Advisory” guidance on international financial transactions between overseas party “arranged, negotiated or executed” by a U.S. based individual,<sup>115</sup> that was delayed several times (indicating it perhaps should be a

commented-upon rule, instead) and said to jeopardize thousands of jobs by potentially sending them offshore.<sup>116</sup>

- A flow of **Education Department** guidance, at the rate of one issuance per business day, imposing new mandates on colleges and schools without going through the notice-and-comment process required by the APA.<sup>117</sup> According to the bipartisan Senate-appointed Task Force on Federal Regulation of Higher Education, “In 2012 alone, the [Education] Department released approximately 270 ‘Dear Colleague’ letters and other electronic announcements.”<sup>118</sup> “Recalibrating regulation of colleges and universities. Exceedingly high-profile, controversial recent guidance has included:
  - Guidance (a 2011 “Dear Colleague”) to colleges and universities on sexual assault and harassment.<sup>119</sup> Noteworthy is that the civil rights laws’ applicability to the institutions, not the students, but altered by guidance.<sup>120</sup>
  - Guidance letter (a 2010 “Dear Colleague”) on bullying and harassment.<sup>121</sup>
  - Guidance (a 2016 “Dear Colleague”) co-produced with the **Department of Justice’s Civil Rights Division** requiring inclusion of “gender identity” in the definition of “sex” and requiring schools to allow transgender students to choose which bathroom or locker room to use.<sup>122</sup>
  - 2016 Policy Statement from the Education Department and the **Department of Health and Human Services** “preventing and severely limiting expulsion and suspension practices in early childhood settings”<sup>123</sup> without basis in law or notice and comment.<sup>124</sup>
- The **U.S. Department of Agriculture’s Forest Service’s** “Notice of Final Directive” permanent Ecosystem Restoration policy to replace Interim Directive, “Ecological Restoration and Resilience Policy,” in Forest Service Manual (FSM) 2020, providing broad guidance for restoring ecosystems.<sup>125</sup>
- **Department of Homeland Security** guidance to retailers on spotting home-grown terrorists.<sup>126</sup> As DHS Secretary Jeh Johnson put it, “To address the home-grown terrorist who may be lurking in our midst, we must also emphasize the need for help from the public. ‘If You See Something, Say Something’ is more than a slogan. For example, last week we sent a private sector advisory identifying for retail businesses a long list of materials that could be used as explosive precursors, and the types of suspicious behavior that a retailer should look for from someone who buys a lot of these materials.”<sup>127</sup>
- The **Department of Labor Wage and Hour Division’s** blog post and “Administrative Interpretation No. 2015-1” informing the public that most independent contractors are now employees.<sup>128</sup>
- The **Department of Labor Wage and Hour Division’s** “Administrative Interpretation No. 2016-1” asserting a WHD-defined possibility of “joint employment” under the Fair Labor Standards Act on case-by-case basis in horizontal and vertical contracting situations “to ensure that all responsible employers are aware of their obligations.”<sup>129</sup> With this interpretation, the DoL “will hold more employers liable for wage violations

against employees they do not directly employ. The enforcement effort will focus on the construction, hospitality, janitorial, staffing agencies, and warehousing and logistics”<sup>130</sup> and potentially “penalize any industry that utilizes contractors and labor suppliers.”<sup>131</sup>

- Three **Department of Labor** guidance documents regarding the Process Safety Management (PSM) standards for hazardous chemicals have been highlighted by Sen. James Lankford (R-Oklahoma) as bringing a range of manufacturers and retailers within the scope of regulation without the opportunity for public comment.<sup>132</sup> A letter to the Labor Department noted: “These three guidance documents are expected to dramatically expand the universe of regulated parties, create extreme logistical and financial burdens on regulated parties, and convert flexible recommended practices into mandatory requirements—all without the opportunity for public comment. We therefore ask that OSHA immediately withdraw these memoranda.” Subject matter of the three guidance documents concerned engineering practices, retail exemptions, and chemical concentrations subject to PSM.
- In addition to Department of Labor guidance, greater use by the **National Labor Relations Board** of memoranda that affect non-union employers.<sup>133</sup>
- The **Equal Employment Opportunity Commission** has issued a series of guidance documents on pregnancy discrimination and accommodation in the workplace, credit checks on potential employees, and criminal background checks.<sup>134</sup>
- Guidance from the **Consumer Financial Protection Bureau** in the form of a “Bulletin” on “Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act” limits the ability of automobile dealers to offer discounts to customers allegedly in the name of credit fairness and eliminating racial bias (“When such disparities exist within an indirect auto lender’s portfolio, lenders may be liable under the legal doctrines of both disparate treatment and disparate impact”).<sup>135</sup> Given the size of the auto lending marketplace this is clearly an economically significant measure that at the very least required a rulemaking rather than guidance, as well as concerns that even the CFPB recognized internally that it was overestimating bias<sup>136</sup> led to bipartisan House of Representatives passage of H.R. 1737 the “Reforming CFPB Indirect Auto Financing Guidance Act” (a Senate version S. 2663 awaits action) to revoke the guidance.<sup>137</sup> The bill would force CFPB “to withdraw the flawed guidance that attempts to eliminate a dealer’s ability to discount auto financing for consumers. The bill also requires the minimal safeguards the agency failed to follow, such as public participation and transparency.”<sup>138</sup>
- A claim in the German press, repeated by Reuters, that the **Environmental Protection Agency**, in response to automaker Volkswagen’s deploying “defeat device” software to circumvent EPA emissions standards for nitrogen oxides,<sup>139</sup> is influencing that company to build electric cars and electric car charging stations in the United States.<sup>140</sup> One concern for policymakers is to decide how to talk about and treat judgments as regulatory matters, and to recognize when such decrees, penalties aside, will have the effect of improperly influencing the market trajectory of an entire sector.

- The **Council on Environmental Quality’s** Revised Draft Guidance for Greenhouse Gas Emissions and Climate Change Impacts<sup>141</sup> that makes the National Environmental Policy Act a global warming instrument, particularly through federal land management decisions. The guidance is under seemingly perpetual review, but “describes how Federal departments and agencies should consider the effects of greenhouse gas emissions and climate change in their NEPA reviews,” holding that “agencies should consider both the potential effects of a proposed action on climate change, as indicated by its estimated greenhouse gas emissions, and the implications of climate change for the environmental effects of a proposed action,” and expanding upon 2010 draft guidance, “applies to all proposed Federal agency actions, including land and resource management actions.” Elizabeth Lake on the site Law360 asserts that the new draft “appears to push federal agencies to use NEPA to take a more activist stance in reducing GHG emissions”:<sup>142</sup>

[W]hile courts have held that NEPA is a procedural statute, requiring only a “hard look” at environmental impacts (NRDC v. Morton, 458 F.2d 827, 838 (D.C.Cir., 1972)), this CEQ proposed guidance goes well-beyond this doctrine by instructing agencies to use the NEPA process to force the substantive reduction of GHG emissions.

- The **Department of Transportation’s Federal Aviation Administration** June 2016 final rule on drones, “Operation and Certification of Small Unmanned Aircraft Systems,”<sup>143</sup> is highly restrictive,<sup>144</sup> requiring line-of-sight and no night-time operations among much else, ignoring the ability of technological and contractual solutions to address risk, and refusing to stand down to local law enforcement solutions. But it also contains declarations from the agency regarding case-by-case waivers, as well as a large quantity of forthcoming guidance, much of which would seem to be economically significant, on issues like: industry best practices; risk assessment; potential guidance on external load operations; guidance associated with not dropping objects in ways that damage persons or property; advisories on training and direction to air traffic control facilities; preflight checks for safe operation; vehicle conditions for safe operations; and guidance “on topics such as aeromedical factors and visual scanning techniques.”
- Prior to the guidance-heralding final rule, there had been a **Federal Aviation Administration** rule interpretation on drones via a “Notice of Policy”<sup>145</sup> that temporarily outlawed commercial activity in violation of the APA, before a reversal by the National Transportation Safety Board.<sup>146</sup>

### *An Inventory of Significant Executive Agency Guidance*

With respect to “significant guidance,” some executive, though not independent, agencies comply or make nods toward compliance with a 2007 OMB memo on “Good Guidance Principles”—in effect, guidance for guidance.<sup>147</sup> “Significant” guidance often means that having an economic effect of \$100 million annually, similar to the definition for significant and major rules.<sup>148</sup> In fact, President George W. Bush’s executive order 13422 subjected significant guidance to OMB review.<sup>149</sup> President Obama’s EO 13497 revoked that requirement early in his

presidency, but in March 2009, then-OMB Director Peter Orszag issued a memo to “clarify” that “documents remain subject to OIRA’s [the] review under [longstanding Clinton] Executive Order 12866.”<sup>150</sup>

With conspicuous exceptions such as the Departments of Energy, Housing and Urban Development, and Health and Human Services (HHS), some agencies not only continue to invoke the 2007 OMB memo, but follow its directive of maintaining Web pages devoted specifically to their “significant guidance,” even though it is a suggestion rather than a command. Indeed the FDA confesses no “significant guidance,” even though there are 1,184 pieces of acknowledged final guidance from FDA.<sup>151</sup>

Table 6 lists a running inventory of significant guidance documents based largely upon these scattered executive department and agency websites.<sup>152</sup> There are 580 significant guidance documents in total in this compilation (as of August 2015).<sup>153</sup> The EPA’s 206 significant guidance documents dominate the tally.

**Table 6. Significant Guidance Documents in Effect: A Partial Inventory  
Executive Departments and Agencies**  
(As of August 2015)  
*(Full chart with links maintained at [www.tenthousandcommandments.com](http://www.tenthousandcommandments.com))*

<b>Department of Agriculture</b>	
Agricultural Marketing Service	0
Animal and Plant Health Inspection Service	0
Economic Research Service	4
Food and Nutrition Service	4
U.S. Forest Service	7
Food Safety and Inspection Service	17
Grain Inspection, Packers & Stockyards Admin	0
National Agricultural Statistics Service	0
Risk Management Agency	0
<b><u>USDA Total</u></b>	<b><u>32</u></b>
<b>Department of Commerce</b>	
National Oceanic and Atmospheric Administration	0
Patent and Trademark Office	3
<b>Department of Defense</b>	<b>1</b>
<b>Department of Education</b>	
Adult Education	2
American Recovery & Reinvestment Act of 2009	12
Career and Technical Education	11
Civil Rights	28
Elementary and Secondary Education	61
Grants and Contracts	1

Higher Education	4
Special Education	21
<b><i>Department of Education Total</i></b>	<b><i>140</i></b>

**Department of Health and Human Services**

Centers for Disease Control and Prevention	1
Centers for Medicare and Medicaid Services	0
Food and Drug Administration	0
Office of the Inspector General	0

**Department of Homeland Security**

National Infrastructure Protection Plan	1
U.S. Citizenship and Immigration Services	26
U.S. Coast Guard	7
U.S. Customs and Border Protection	0
Federal Emergency Management Agency	12
Immigration & Customs Enforcement	0
Transportation Security Administration	12
<b><i>DHS Total</i></b>	<b><i>58</i></b>

**Department of the Interior**

Bureau of Indian Affairs	0
Bureau of Land Management	0
Bureau of Reclamation	0
Bureau of Ocean Energy Mgmt, Reg & Enf.	0
National Park Service	0
Surface Mining Reclamation and Enforcement	2
Fish and Wildlife Service	2
<b><i>DoI Total</i></b>	<b><i>4</i></b>

**Department of Justice**

Antitrust Division	2
Civil Rights Division	10
Federal Bureau of Investigation	0
Drug Enforcement Administration	8
Office of Justice Programs	10
U.S. Trustee Program	3
<b><i>DoJ Total</i></b>	<b><i>33</i></b>

**Department of Labor**

Employee Benefits Security Administration	0
Office of Federal Contract Compliance Programs	0
Employment and Training Administration	34
Mine Safety and Health Administration	2
Wage and Hour Division	0
<b><i>DoL Total</i></b>	<b><i>36</i></b>



<b>Department of State</b>	0
<b>Department of Transportation</b>	
Office of the Secretary	11
Federal Aviation Administration	38
Federal Highway Administration	0
Federal Motor Carrier Administration	0
Federal Railroad Administration	0
Federal Transit Administration	7
Maritime Administration	7
National Highway Traffic Safety Administration	1
Pipeline and Hazardous Materials Safety Admin.	0
<b><i>Trans. Total</i></b>	<b><i>64</i></b>
<b>Department of the Treasury</b>	2
<b>Department of Veterans' Affairs</b>	0
<b>Environmental Protection Agency</b>	
Office of Air and Radiation	60
Office of Chemical Safety and Pollution Prevention	39
Office of Environmental Information	3
Office of Solid Waste and Emergency Waste	50
Office of the Science Advisor	19
Office of Water	20
Regional Offices	15
<b><i>EPA Total</i></b>	<b><i>206</i></b>
<b>TOTAL</b>	<b>580</b>

The preceding table is not purported to be comprehensive. The approach was to follow Unified Agenda agency listing, supplemented with the Federal Register Index of agencies to capture sub-units; some information was gathered via searching “significant guidance” at agencies and examining results. This compilation amounts to the subset web-posted in fulfillment of OMB’s 2007 “Agency Good Guidance Practices”; not necessarily posted in obvious manner, but at least posted.

Where a “0” (zero) appears for an agency count, it is because a dedicated page for significant guidance was provided, even if no guidance appeared or had been issued. That is useful information in itself, to demonstrate inactivity, or to underscore improbable claims of no significant guidance in play such as at the Food and Drug Administration, the Department of Homeland Security’s U.S. Customs and Border Protection and its Immigration and Customs, Interior Department bureaus, or the Department of Labor’s Wage and Hour Division.

Reporting quality from executive agencies varies, as does the length of documents and the number and nature of mandates contained within guidance. Where things are is sometimes a mystery to the agencies (HUD, unhelpfully: “To find a specific publication, you can search our entire web site.”<sup>154</sup> Some agencies, such as several U.S. Department of Agriculture (USDA) and HHS sub-units, maintain online landing pages dedicated to significant guidance, but claim none to report. Sometimes an agency subunit, like the Office of Diversion Control at the Department of Justice, will present own set of guidance documents not noted by the parent agency.<sup>155</sup> Similarly, the Federal Emergency Management Agency within the Department of Homeland Security lists guidance documents under several sub-agencies. Some, like the FDA’s Office of the Inspector General, report no guidance that rises to the level of significance,<sup>156</sup> yet it hosts other Web pages presenting certain public guidance.<sup>157</sup> Some agencies feature sophisticated search engines (FDA, although it fails to flag any significance); some present detailed itemizations (EPA, Interior); some host descriptive Web pages and list guidance documents on a separate pdf or Word file (Education). Other times, guidance may rise to the level of significance, but it is up to the reader to figure it out. For example, at the Centers for Medicare and Medicaid (CMS) services, we are told of thousands of pieces of guidance:

CMS issues thousands of new or revised guidance documents annually and cannot make individual decisions on each as to whether it is “significant” as defined under the Executive Order (e.g., annual effect of \$100 million or more on the economy). At present, there are approximately 37,000 documents on the CMS Web site and many, perhaps most of these, include guidance.<sup>158</sup>

Indeed, the agency “seems unable to keep pace with its own frenetic lawmaking.”<sup>159</sup> While an agency may choose not trouble itself determining significance, those affected do not have that luxury. While Table 5 understates significant guidance counts, since some agencies do not report at all, and those that do self-report, it still serves as an inventory of some of what we know, and as an exercise in showing policy makers and interested parties *what we do not know*. For example, while the Centers for Medicare and Medicaid Services acknowledges thousands of directives of indeterminate impact, GAO noted in 2015 that four agencies issue between 10 and 100 guidance documents per year.<sup>160</sup> The Department of the Interior, which issued 94 rules in 2014, boasts that the Fish and Wildlife Service, one of its several agencies, usually publishes more than 500 *Federal Register* documents annually.<sup>161</sup> Given all the agency disclaimers and qualifications, no representations of completeness are made here.<sup>162</sup> Indeed, the notorious EPA offers no warranties of completeness: “Please be aware that the lists do not include every guidance document issued by EPA. They only encompass those documents that are ‘significant’ as defined by the GGP Bulletin.” The OMB order is not strictly binding, yet the EPA does solicit public comment, and that is a stance policy makers can build upon.<sup>163</sup>

During the 10-year period 2005-2014, OMB reported: “Federal agencies published 36,457 final rules in the *Federal Register*.” OMB reviewed 2,851 of these, among which 549 were considered major.<sup>164</sup> While guidance specifically deemed “significant” seems comparable to the number of major rules, agencies like Interior and CMS maintain document flows that rival or outpace rulemaking, so Congress needs to pay more attention to guidance documents, whether they are deemed significant or not.

Even a small number of guidance documents can have a significant impact. The Justice Department's Antitrust Division has only two documents classified as significant guidance documents, but other important DOJ policy statements, guidance documents, and notices affect such matters as cybersecurity, joint ventures, intellectual property, health care, and mergers.<sup>165</sup> Many of these are economically significant for those affected. Until Congress requires consistency in guidance reporting, the haphazard nature of what agencies publicly disclose as guidance in response to the 2007 OMB memo will remain striking.

For present purposes, our concern is guidance affecting the private sector, but guidance directed at agency procedures gets lumped in by those complying with the 2007 memo, such as the National Archives compilation of guidance pertaining to the release of classified information.<sup>166</sup> Other guidance affecting agencies can be noteworthy, such as numerous OMB privacy guidances to federal agencies over the years.<sup>167</sup> Sound future reporting will need to make distinctions.

### *Significant Independent Agency Guidance*

Independent agencies sometimes compile guidance on landing page websites, though they are not required to list their guidance documents under the 2007 OMB directive. The U.S. Equal Employment Opportunity Commission (EEOC) maintains a Web page where it lists its significant guidance documents (23 entries as of this writing).<sup>168</sup> Other EEOC guidance not among these includes guidance to employers on the accommodation of pregnancy.<sup>169</sup> Among other agencies, there is the Federal Trade Commission's page of "Advisory Opinions" issued "to help clarify FTC rules and decisions,"<sup>170</sup> as well as its page detailing "Guidance,"<sup>171</sup> a recent example of which was advertising guidance on disclosure of paid search engine results.<sup>172</sup> The Consumer Financial Protection Bureau has published numerous guidance documents and further ominously invites the regulated public to contact the Office of Regulations "to receive informal guidance from a staff attorney."<sup>173</sup>

While not formal rules, guidance from independent agencies often carries veiled warnings that you best pay attention. The Federal Housing Finance Agency (FHFA), for example, issues guidance with the standard caveat: "Although an Advisory Bulletin does not have the force of a regulation or an order, it does reflect the position of FHFA on the particular issue and is followed by supervisory staff."<sup>174</sup>

In the wake of the Dodd-Frank financial law, banking agency guidance in particular is on the rise. One industry newsletter noted:

The pace in which banking agencies are issuing guidance appears to have increased considerably since the economic downturn. There have been well over 20 significant pieces of interagency guidance issued just since 2010, including those covering appraisal and evaluations, concentration risk, interest rate risk management and troubled debt restructurings. This does not even include the stand-alone guidance that agencies unilaterally issue in the form of financial institution letters (FDIC), bulletins (Office of the Comptroller of the Currency) and supervision and regulation letters (Federal Reserve Board).<sup>175</sup>

The Federal Reserve Bank of St. Louis compiles itemized lists of federal banking guidance it deems “significant” (in addition to lists of standard notice-and-comment regulation).<sup>176</sup> While this characterization of “significant” will not necessarily conform to the 2007 OMB memo nomenclature, the current tally of 69 guidance documents appears summarized nearby in Table 7. Note that some financial sector guidance is multi-agency (The Treasury Department, an executive agency, is listed here for completeness).

**Table 7. Independent Agency Significant Guidance: A Partial Inventory  
(As deemed significant by the St. Louis Fed)**

Commodity Futures Trading Commission	2
Consumer Financial Protection Bureau (CFPB)	12
Federal Deposit Insurance Corporation (FDIC)	11
Federal Financial Institutions Examination Council (FFIEC)	2
Federal Housing Finance Agency	2
Office of the Comptroller of the Currency (OCC)	29
Securities and Exchange Commission	5
Treasury Department	1
FDIC/Board of Governors of the Federal Reserve System (FRS)	1
FDIC/FRS/OCC	6
FDIC/FRS/National Credit Union Administration (NCUA)/OCC	1
FDIC/FinCEN/FRS/NCUA/OCC	1
<u>CFPB/FDIC/FFIEC/FRS/NCUA/OCC</u>	<u>1</u>
<b>TOTAL (As of 10/14/2015):</b>	<b>74</b>

Note that this compilation represents a handful of pieces of “significant” banking guidance. The Federal Agency Guidance Database from the Conference of State Bank Supervisors contains a far larger number of other financial sector items like directives, manuals, notices, announcements, and more from numerous agencies.<sup>177</sup> Yet there is even more dark matter from both executive and independent agencies.

***Notices and Other Things that Are Not Quite Regulations that May or May Not Bind the Public***

*[W]hen I am 100 percent utterly and completely certain that it is an absolute certainty that it is an absolute necessity that I need to recruit a new employee, I go to bed, sleep well and hope that the feeling has gone away by the morning.*

—A British businessman lamenting French labor regulations.<sup>178</sup>

*And no one seems sure how many more hundreds of thousands (or maybe millions) of pages of less formal or “sub-regulatory” policy manuals, directives, and the like might be found floating around these days.*<sup>179</sup>

—Judge Neil Gorsuch, 10th Circuit,  
*Caring Hearts Personal Home Services, Inc. v. Burwell*

House Majority Leader Kevin McCarthy (R-Calif.) was called out by *The Washington Post*'s fact checker, for claiming in January 2015 that there were 300 federal rules issued in just a week.<sup>180</sup> He quickly corrected and noted a staffer's blooper in counting notices and proposed rules alongside final rules. But that only raises the question: How can we measure, much less bring under control, the effects of tens of thousands of notices, guidance documents, memos, and other regulatory dark matter when it is so difficult just to determine their actual number?

You read right, tens of thousands. The emphasis so far has been on significant guidance, but there is much more agency dark matter beyond significant guidance. It is worth keeping in mind that the denial of significance is a prerogative agencies already exercise liberally for ordinary APA notice-and-comment rules.

“Public Notices” in the *Federal Register* are “non-rulemaking” documents like meeting and hearing notices and agency-related organizational material. They can also serve as a catch-all for dark matter that manages to get published in the *Federal Register*. Notices make up the bulk of the *Federal Register*, and there are tens of thousands of them yearly—23,970 in 2014, over 19,000 so far in 2015. They can include policy statements, manuals, memoranda, circulars, bulletins, and guidance and alerts, many of which could be important to the public.<sup>181</sup> Matter that may or may not rise to the level of guidance document deemed as significant by OMB may appear among notices. Like major rules treated as non-major but that are in fact major in a real-world sense, guidance that actually is significant but not treated as such could be buried among notices. As noted, OMB is not clear on this.

The FDA's search page on Guidance Documents, for example, illuminates much more going on below the surface. While the agency reports no officially “significant” guidance, under the “document type” heading, we find not just ordinary guidance documents for which one may search, but also:

- Agreement
- Bulletin
- Compliance Policy Guide
- Concept Paper
- Industry Letter
- Information Sheet
- Manual
- Memorandum
- Small Entity Compliance Guide
- Special Controls Document

However, this, is just one agency's inventory of Things that Are Not Quite Regulations. On the regulations.gov website, dozens of document sub-types in addition to rules and notices of rulemakings appear:<sup>182</sup>

Denial of Application  
Action Memo/Letter  
Adjudication

Advisory Opinions  
Agreement/Contract  
Analysis

Approval	Meeting Materials
Audit	Memorandum
Brief	Motion
Certification	Notice of Adequacy
Clarification	Notice of Approval
Comment Response	Notice of Data Availability
Company/Organization Comment	Notice of Filing
Complaint	Notice of Intent
Consent Decree	Notice of Receipt of Petition
Consent Order	Order
Data	Permit/Registration
Decision	Petition
Decree	Policy
Delay of Effective Date	Press Release
Determinations	Public Announcement/Notice
Early comment	Procedure
Economic Analysis	Public Comment
Environmental Assessment	Public Hearing
Environmental Impact Statement	Deposition/Testimony
Evaluation	Public Participation
Exemption	Publication
Extension of Comment Period	Report
Fact/Data Sheet	Request for Comments
Findings of Fact	Request for Grant Proposals
Guidance	Risk Assessment
Hearings	Settlement Agreement
ICR Supporting Statement	Significant Guidance
Industry Circular	Study
Information Collection Request	Supplement
Interagency Review	Technical Support Document
Letter	Waivers
Management Directive	Withdrawal
Meeting	Work Plan

This rather exhaustive “word cloud” captures the magnitude of the matter. Determining what is binding is a challenge, to put it mildly. Table 8 shows annual counts, which stood at 24,393 in 2015, and have, apart from 2014, topped 24,000 since 1995. The total count for notices since 1994 has been 538,248. That is over half a million in 20 years.

To what extent do notices get review or oversight? While it is unclear what the criteria are, a portion get reviewed at OMB as if they were the same as notice-and-comment rules, and some notices are even deemed “significant” under EO 12866. As Table 8 shows, at least a few dozen notices rise to the level of receiving OMB review during each calendar year, with around half that many deemed “significant.” All in all, since 1994, OMB says it has reviewed 983 notices, of which 492 were significant. In addition, 130 have been flagged “economically significant” (entries of this type abruptly halted in October 2014 through at least December 2015, but have

since been resumed).<sup>183</sup> But what criteria may trigger review of notices and the application of these particular categories is not specified. “The OIRA website is vague about what constitutes a notice,” former OIRA Administrator John Graham and James Broughel note: “More clarity about what constitutes guidance notices worthy of review would be valuable.”<sup>184</sup>

**Table 8. Public Notices in the *Federal Register***

	<b>Total Notices</b>	<b>OMB Reviews</b>	<b>Significant Rules Under EO 12866</b>	<b>Economically Significant Notices</b>
1995	23,162	53	18	4
1996	24,367	31	24	3
1997	26,033	51	21	9
1998	26,197	40	22	3
1999	25,505	36	24	4
2000	25,470	40	30	2
2001	24,829	37	24	10
2002	25,743	55	36	9
2003	25,419	59	35	7
2004	25,309	58	23	9
2005	25,353	59	18	8
2006	25,031	46	18	8
2007	24,476	25	12	2
2008	25,279	28	25	6
2009	24,753	49	22	8
2010	26,173	77	34	17
2011	26,161	61	31	4
2012	24,408	40	19	6
2013	24,261	37	22	2
2014	23,970	46	18	5
2015	24,393	35	12	4
2016*	11,956	20	4	0
<b>TOTALS:</b>	<b>538,248</b>	<b>983</b>	<b>492</b>	<b>130</b>

\*As of 6/23/2015; Figures updated at [www.tenthousandcommandments.com](http://www.tenthousandcommandments.com). Sources: Total Notices: from National Archives and Records Administration, Office of the Federal Register and author search on [FederalRegister.gov](http://FederalRegister.gov) advanced search function; Number of “Significant” Notices under EO 12866: author search on [FederalRegister.gov](http://FederalRegister.gov) advanced search function; number of OMB Reviews: author search on [RegInfo.gov](http://RegInfo.gov), review counts database search engine under Regulatory Review heading.

Oversight matters. The number of notices, *Federal Register* pages, and final rules dropped significantly following President Reagan’s EO 12291, before starting to rise again.<sup>185</sup> The “other” documents category in the *Federal Register* (which included these notices plus presidential documents) had been as high as 33,670 in 1980.<sup>186</sup> During the late 1980s, the tally hovered at a considerably lower 22,000 annually.<sup>187</sup> Since 1976, there have been well over one million “other” documents or notices.<sup>188</sup> There is no coordinated congressional or executive branch effort to identify the regulatory dark matter embedded within the thousands of agency notices, but that is exactly what is needed.

At the individual agency level, some guidance and notice material gets listed on cabinet agency websites much like OMB-compliant significant guidance does. For example, the USDA's Animal and Plant Health Inspection Service has no online tally of significant guidance, but does post numerous "Manuals and Guidelines."<sup>189</sup> More examples are the "Advisory Opinions" page from the Department of Commerce's Bureau of Industry and Security,<sup>190</sup> the "Agency Guidance" page from the Department of Transportation's Pipeline Safety and Hazardous Materials Safety Administration,<sup>191</sup> the Department of Energy's "Policy and Guidance" page,<sup>192</sup> and the Department of Housing and Urban Development's "Public Guidance Documents" page on real estate settlement regulations.<sup>193</sup>

Beneath agency guidance not officially deemed significant, we descend the great regulatory chain of being to such diktats as "circulars" at the Federal Transit Administration,<sup>194</sup> "policy statements" at Federal Energy Regulatory Commission,<sup>195</sup> and "Warning Letters" to businesses from the FDA.<sup>196</sup> One pointed warning letter can change firms' behavior, such as the FDA's calling out of a company for making health claims about nuts,<sup>197</sup> and its warning to the genetic testing company 23andMe to halt marketing of its Saliva Collection Kit and Personal Genome Service for failure to secure premarket approval.<sup>198</sup> Agencies issue *hundreds* of such letters, such as the Federal Trade Commission's recent letters to five skin care companies over using the claim "natural."<sup>199</sup> (The extent to which the U.S. federal government micromanages individual firms is not examined in depth here but is another thing that sets dark matter apart from ordinary lawmaking.)

And it continues. For independent agencies not obliged to obey even the loose bounds of the OMB Good Guidance Principles memo, there are numerous forms of guidance. These include:

- The Consumer Financial Protection Bureau's "Guidance Documents;"<sup>200</sup>
- The Federal Deposit Insurance Corporation's "Supervisory Guidance" page<sup>201</sup> (as well as a page of numerous "Financial Institution Letters;"<sup>202</sup>
- The Commodity Futures Trading Commission's "Staff Letters"<sup>203</sup> and "Opinions and Adjudicatory Orders;"<sup>204</sup>
- The Federal Housing Finance Administration's "Advisory Bulletins;"<sup>205</sup> and
- The Consumer Product Safety Commission Office of General Counsel's "Advisory Opinions,"<sup>206</sup> "Voluntary Standards,"<sup>207</sup> and "Recall Guidance."<sup>208</sup>

Among dark matter, "Sue and settle" orders expand government's power and size without congressional oversight, or even the APA's weak discipline.<sup>209</sup> These consent and settlement agreements "commit ... the agency to actions that haven't been publicly scrutinized," as Senate Judiciary Committee Chairman Grassley remarked in June 2015 upon introducing legislation to "shine light on these tactics and provide much-needed transparency before regulatory decisions are finalized."<sup>210</sup> Tallies of enforcement actions and administrative law rulings are worth further study in the context of the overall regulatory state, especially given the development that substantial recent agency rulemakings have been overturned by courts.<sup>211</sup>

In the previous section, we noted 69 pieces of "significant" financial agency guidance as compiled by the St. Louis Fed, primarily from executive agencies. The Conference of State Bank



Supervisors’ federal guidance database lists a greater collection of bulletins, directives, manuals, notices, announcements, and more from several financial agencies such as the Consumer Financial Protection Bureau.<sup>212</sup> Table 9 shows these 1,445 items in effect as of August 2015. Note that the Treasury Department appears here with a hefty count of 175 items, as does its financial crimes unit and the Office of Thrift Supervision, whereas in the executive branch significant guidance inventory above it sported only two items.

**Table 9. Financial Agency Directives: A Partial Inventory  
Compiled by the Conference of State Bank Supervisors**

*All guidance published by the Federal Financial Regulatory Agencies*

Consumer Financial Protection Bureau (CFPB)	49
Financial Accounting Standards Board (FASB)	56
Federal Deposit Insurance Corporation (FDIC)	225
Federal Reserve Board	370
Federal Financial Institutions Examination Council (FFIEC)	56
Federal Housing Finance Agency (FHFA)	32
Financial Crimes Enforcement Network (FinCEN)	204
Office of the Comptroller of the Currency (OCC)	192
Office of Thrift Supervision (OTS)	48
Securities and Exchange Commission (SEC)	38
Treasury Department	175
<b>TOTAL (As of 10/14/2015):</b>	<b>1,445</b>

Many notice-and-comment regulations already lack impact analysis. Notices, memos, bulletins, guidance, and the like number in the thousands and deserve policy makers’ attention. We have highlighted over 1,400 affecting the financial sector alone, but there are many tens of thousands of documents in play across the economy.

### **The Dark Energy of the Regulatory Process: When Fewer Regulations Mean Less Freedom**

*To limit abuse by the rulers, ancient Rome wrote down the law and permitted citizens to read it. Under Dodd-Frank, regulatory authority is now so broad and so vague that this practice is no longer followed in America. The rules are now whatever regulators say they are.<sup>213</sup>*

– Former Texas Senator Phil Gramm

As everything gets cartelized into business government partnerships, they don’t need to issue a written regulations anymore or need to far less

Policy makers routinely debate regulatory costs, but regulatory dark matter’s consequences can escape measurement, undermining efforts to fully assess the impact or cost of regulatory intervention. No one really knows what the regulatory state “weighs.” For example, the federal government’s running of Social Security, on top of trust fund sleight of hand, is not counted as a cost of intervention. Yet there is a substantial cost in the extra wealth people could have

accumulated through investing, and in the inability to bequeath an estate to heirs after a lifetime of garnishment. Yet government says it needs more control to deal with the income inequality it has in no small measure helped cause.

In other words, as government grows to encompass more spheres of activity—from health care to finance to the Internet—agencies will be able to issue fewer written rules yet still expand control. They will not need a law from Congress, notice-and-comment rules, or perhaps even the interpretive guidance, memos, and the like depicted herein. In an instant classic example, consider the *Credit Union Times*' warning to the industry about the Dodd-Frank financial law's "unfair, deceptive, or abusive acts and practices" (UDAAP) provisions:<sup>214</sup>

UDAAP does not have any implementing regulations and it probably never will. In fact, CFPB Director Richard Cordray said the bureau will not issue any regulations that define exactly what actions or practices violate the law. ... So how will a bank, credit union or other financial services provider know if it has violated the law?

As modern bureaucracies take this stance, "law" can become even more arbitrary and even more non-democratic than the dark matter itself. The Consumer Financial Protection Bureau tells regulated parties: "You can contact our Office of Regulations to receive informal guidance from a staff attorney about the Bureau's regulations. ... Any such informal guidance would not constitute an official interpretation or legal advice."<sup>215</sup> Who will not obey? Sen. Mike Lee addressed the concern with respect to CFPB when announcing 2016 legislation for a "regulatory budget." He stated:<sup>216</sup>

In 2012, for instance, when testifying before Congress, the director of the CFPB explained that his agency's mandate was "a puzzle" and that CFPB bureaucrats would define "unfair, deceptive, [and] abusive" on a case-by-case basis. This not-uncommon mindset of federal bureaucrats explains why laws passed decades ago are still spawning new regulations today.

In affirmation of that mindset, the CFPB attempted to assert authority over college accrediting agencies and begun probes, a power not given to it by Congress.<sup>217</sup> The D.C. federal district court ruled in 2016 that the agency exceeded its statutory authority when it issued an August 2015 Civil Investigative Demand to the Accrediting Council for Independent Colleges and Schools.<sup>218</sup>

Other examples of the regulatory mindset include federal agency assertions of authority over non-banks like insurance firms in the wake of Dodd-Frank,<sup>219</sup> and "systemically important" financial institution designations by the Financial Stability Oversight Council's secret processes in the wake of Dodd-Frank conform to the "black box" characterization of how some agency rulemaking takes place today, and were rebuked by Government Accountability Office examinations.<sup>220</sup>

Another alarming example of the descent into arbitrary, unwritten lawmaking influencing an entire sector of the economy is the Federal Communications Commission's order on net

neutrality. Here we see the unprecedented use of “advisory opinions” that threaten the industry’s autonomy and capacity to innovate.<sup>221</sup>

We conclude that use of advisory opinions similar to those issued by DOJ’s Antitrust Division is in the public interest and would advance the Commission’s goal of providing legal certainty. Although the Commission historically has not used advisory opinions to promote compliance with our rules, we conclude that they have the potential to serve as useful tools to provide clarity, guidance, and predictability concerning the open Internet rules. *Advisory opinions will enable companies to seek guidance on the propriety of certain open Internet practices before implementing them*, enabling them to be proactive about compliance and avoid enforcement actions later. The Commission may use advisory opinions to explain how it will evaluate certain types of behavior and the factors that will be considered in determining whether open Internet violations have occurred. [Emphasis added]

In effect, the FCC, now with the D.C. District Court of Appeals’ blessing,<sup>222</sup> elected to regulate tomorrow’s Internet as if it were yesterday’s common carrier utility. Companies will be demeaned and reduced to checking with the commission first before conducting business; no laws need be passed by Congress, and no further APA-compliant rules need be issued by the agency for it to be able to exert control over the Internet industry’s future. This regime will start with infrastructure firms, but is guaranteed to eventually encompass the content and app sectors despite the FCC’s assurance to the contrary.<sup>223</sup> And the courts are little help so far. As Bret Swanson noted with respect to the D.C. District Court of Appeals June 2016 upholding of FCC’s rules, “Decades ago, Congress passed, and the president signed, a law saying the Internet shall remain “unfettered by Federal and State regulation,” but the courts now say agencies may in fact do so at will.”<sup>224</sup> Further, the FCC maintains its energy in traditional antitrust regulatory intervention, with new twists. The commission approved the recent Charter-Time Warner merger, but with “voluntary” side agreements the agency lacked authority to impose.<sup>225</sup>

In an effort perhaps not to be outdone by CFPB, the Office of the Comptroller of the Currency’s “Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective,” proposes an Orwellian, “centralized office on innovation”;<sup>226</sup> like the preemptory, Mother-may-I “advisory opinion” guidance to apply to telecom before anyone in that sector moves, “The office could serve as a forum to vet ideas before a bank or nonbank makes a formal request or launches an innovative product or service.”<sup>227</sup> “To be effective,” readers are assured by OCC, “the improved process should clarify agency expectations” regarding partnerships between banks and non-banks in the evolving financial technology marketplace and “assess whether additional guidance is appropriate to address the needs of banks and their customers in the rapidly changing environment.”<sup>228</sup>

Still another case of tomorrow’s rules being whatever rulers outside Congress say is the Operation Choke Point initiative that originated in President Obama’s Financial Fraud Enforcement Task Force within the Department of Justice, an apparent intimidation campaign aimed at pushing banks to cut off services to legal but politically disfavored businesses like pawn shops and gun stores. There was no law or executive order, no written regulations issued—just

lists of targeted types of businesses, threats against those businesses, and pressure on their banks.  
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Alarming as such developments are, the arbitrariness they embody is not new. Antitrust intervention—or the threat of it—has derailed business deals and redirected economic resources and investment for over a century. The scale, though, is new. Only certain politically connected firms, protected from competitive processes, will be able to thrive in such a system.

Energy is often ill-defined as the ability to do work; the “dark energy” corollary of dark matter might be thought of as that which halts work and productivity. If the universe’s dark energy is “a force that repels gravity,” in the policy realm it might be regarded as a force that repels liberty.<sup>230</sup> In much the way dark matter is crucial to understanding the universe, understanding and curbing the proliferation of regulatory dark matter is now central to the preservation of economic liberty.

## Principles of Reform

*The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny.*<sup>231</sup>

—James Madison, Federalist No. 47.

*The Constitution has been discarded and cannot be restored. ... [S]olutions are now beyond the reach of the electoral and legislative processes. The citizenry must therefore create new counterweights.*<sup>232</sup>

—Charles Murray, *By the People, Rebuilding Liberty without Permission*

The Universe weighs “100 trillion trillion trillion tonnes, give or take a few kilograms,” according to *New Scientist*.<sup>233</sup> Here on Earth, no one knows how much the regulatory state “weighs,” or even the number of agencies at the center of our own bureaucratic “big bang.” But for We, the Regulated, ignorance of the law is no excuse; our “duty to read” the *Federal Register* was established shortly after the Administrative Procedure Act passed, as one drought-suffering Idaho wheat farmer relying upon a complicated federal crop insurance program found out the hard way. In the 1947 case, *Federal Crop Ins. V. Merrill*, Justice Felix Frankfurter delivered the opinion:

Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the *Federal Register* gives legal notice of their contents.<sup>234</sup>

In his dissent, Justice Robert H. Jackson maintained:

To my mind, it is an absurdity to hold that every farmer who insures his crops knows what the *Federal Register* contains, or even knows that there is such a publication. If he were to peruse this voluminous and dull publication as it is issued from time to time in order to make sure whether anything has been promulgated that affects his rights, he would never need crop insurance, for he would never get time to plant any crops. Nor am

I convinced that a reading of technically worded regulations would enlighten him much, in any event.<sup>235</sup>

Decades later, Congress has allowed regulations to expand and rendered us increasingly duty-bound, with little or no say in the matter. As attorney and legal scholar Harvey Silverglate notes, we probably break about three laws a day, without even knowing it.<sup>236</sup> The relationship of the individual to the state continues to change, as the growing quantity and relevance of regulatory dark matter takes the potential for abuse to new heights.

The rise of regulatory dark matter has entirely changed the nature of the regulatory reform debate. It has long been the case that there are far more regulations than laws. That is troublesome enough. But with tens of thousands of agency proclamations annually, OMB review of executive agency “significant” or “major” rules cannot suffice. Ordinary executive agency rules and independent agencies have gotten a pass all along. With dark matter added to the mix, agencies may articulate interpretations and pressure regulated parties to comply without an actual formal regulation or understanding of costs. Left unaddressed, regulatory dark matter can gain new ground, as agencies avoid public and congressional scrutiny by issuing memos, letters, guidance documents, bulletins, and other proclamations and decrees that influence the behavior of the public outside normal Administrative Procedure Act processes and OMB oversight, let alone the constitutional lawmaking process.

To address overregulation and dark matter, Congress must act. It will take the nation’s elected representatives to stop dark matter and punish officials engaging in arbitrary behavior. Power must be returned to elected lawmakers.

Regulatory reform emphasizes the things we can count, so it usually focuses on steps like better cost-benefit analysis, sunseting of rules, bipartisan regulatory reduction commissions, new calls for regulatory budgeting, and other measures.<sup>237</sup> These are important, but the persistence of dark matter means it is not enough to just track notice-and-comment regulation. Below are some principles for Congress to consider in address regulatory dark matter. All must be anchored in Congress explicitly going on record as approving all agency decrees.

### ***All agency decrees matter, not just the “rules”***

Unless Congress requires consistency in the reporting of dark matter, the haphazard nature of what agencies disclose as guidance will continue to be a problem. The 2007 memo is a useful starting point. It should be expanded to cover (1) non-significant guidance since agencies should not get to decide what is significant, and (2) independent agencies. We need what Paul R. Noe and John Graham have called “due process and management” for guidance.<sup>238</sup> Reforms will require creating an authoritative list of federal agencies—one does not currently exist—and requiring each agency to maintain consistent, uniform Web pages and databases. The guidance documents compiled in this report came from many disparate agency sources.

In the process, Congress can hold investigations and hearings to determine agencies’ criteria for classifying guidance documents as significant and the breakdown of the various types of documents issued by agencies each year. Decisions must be made regarding the appropriateness

of some guidance and memoranda not appearing in the *Federal Register*. On disclosure, the All Economic Regulations Are Transparent (ALERT) Act of 2015 aims at broad clarity regarding regulatory impacts with monthly reports and schedules of completion, estimates of costs and economic burdens, and annual summary reports.<sup>239</sup> Such disclosure and “report cards” for individual agencies can and must be expanded to incorporate dark matter.<sup>240</sup>

### ***Congress must subject guidance to enhanced APA-like procedures and more intense OMB review***

To address stealth regulation, John Graham and James Broughel propose options such as reinstating a George W. Bush-era requirement to prepare analysis for significant guidance documents, explicitly labeling guidance documents as nonbinding, and requiring notice and comment for significant guidance documents. They also call for agencies to inform parties “when a communication is only a recommendation and is not legally binding.”<sup>241</sup> These should all be done, but more is needed, since even ordinary regulations outflank such constraints.

Attempts to force more informal regulatory dark matter into the notice-and-comment stream may induce agency creativity in skirting review and using “darker” dark matter measures, like threats and warnings, to escape oversight.<sup>242</sup> In response, Congress can codify President Obama’s four executive orders on regulation, and extend their provisions to guidance. The Regulatory Accountability Act of 2015, which has passed the House, contains provisions on early notice, public participation, evidence requirements, and formal hearings, which can be applied to dark matter.<sup>243</sup>

Canada<sup>244</sup> and Great Britain have both implemented rule-in, rule-out requirements with some success.<sup>245</sup> In the U.S. Senate, legislation called the Regulations Endanger Democracy (RED) Tape Act (S. 1944) would introduce the same requirement for ordinary regulations, and extend it to guidance and memoranda.<sup>246</sup> Another recent effort at implementing a guidance document reform agenda is the Regulatory Predictability for Business Growth Act (S.1487) would require interpretive rules and guidance documents that would alter previously issued interpretive rules to undergo public notice and comment before they can go into effect.<sup>247</sup>

Moreover, problems presented by the fact that guidance is often not published in the *Federal Register* have not been adequately surveyed. What coherence exists between that which does and does not appear in the *Federal Register*? If it is not published there, how does one learn of guidance? Does Congress even know? What good will be a notice and comment regime for guidance if the final product does not get published in some venue where anyone can readily find it?

Administrative and institutional reforms like those noted above can help bring measureable accountability and moderation to the rulemaking process. Administrative disclosure and scrutiny can also play a role. Consider that the number of federal regulations stood around 7,000 in the late 1970s. After Ronald Reagan’s EO 12291 on OMB regulatory review, the count went down to around 6,000 in the early 1980s, then to 4,700 by 1988. The count stayed below 5,000 during the 1990s, and now clocks in each year around the 3,500 mark.

### ***Congress must vote approval of costly or controversial dark matter decrees***

Congress' over-delegation of power is at the root of Washington's out-of-control growth—which has resulted in such indecencies as America's wealthiest zip codes consisting of the ones surrounding the Beltway. It is not enough for OMB to try to do its “darndest” on regulatory oversight and review.<sup>248</sup> Congressional accountability is indispensable in offsetting the pro-regulatory bias that prevails across the entire federal bureaucracy, including its independent agencies.

The new effort by Senators to investigate and scrutinize potential efforts by federal agencies to skirt the law via guidance is well past due. Nothing will change until Congress has to affirm all expensive or controversial agency decrees and actions, from ordinary rules to dark matter. The Regulations from the Executive in Need of Scrutiny (REINS) Act of 2015 (H.R.427), which has already passed the House of Representatives, would require this step for regulations.<sup>249</sup> It should be expanded to cover significant and contentious dark matter.

In the meantime, appropriations restrictions can help rein in agencies' use of dark matter. In addition, Congress should recognize that guidance documents and all dark matter decrees are covered by the Congressional Review Act, and thus subject them to resolutions of disapproval.<sup>250</sup>

### **Conclusion: Congress's To-Do List**

Congress has a duty to affirm that every agency decree matters, not just those subject to formal notice-and-comment or deemed economically significant. Past attempts at serious government downsizing in the 1970s, '80s, and '90s brought partial liberalization of some industries, but fell short when it came to shutting down agencies and increasing agency accountability. Today, circumstances have deteriorated to the point where Congress has no idea of what today's thousands of agency proclamations consist.

Regulation and guidance cannot be controlled without downsizing the federal government and strengthening democratic accountability. That requires reining in the colossal bureaucracies that enable rule by unelected experts. Ending regulation by guidance is especially urgent for frontier sectors such as telecommunications and infrastructure expansion, and policy surrounding drones and automated vehicles. Decades-old agencies are already seeking to regulate new technologies, business models, and contractual arrangements with obsolete rules and without congressional authorization. If government regulation is warranted, Congress should legislate directly rather than tolerate open-ended agency regulation or “informal” guidance. Confronting possible obsolescence of decades old statutes is a necessary, fundamental task.

To accomplish these goals, here are actions Congress should take:

- Abolish, downsize, cut the budgets of, and deny appropriations to aggressive agencies, sub-agencies, and programs that routinely pursue regulatory actions not authorized by Congress.
- Repeal or amend enabling statutes that sustain the regulatory enterprise's excesses in the first place.
- Withhold appropriations for specific agency actions not authorized by Congress.

- Require congressional affirmation for guidance and other agency proclamations likely to have significant economic impact.<sup>251</sup>
- Subject regulatory dark matter to more intense OMB review. By exposing the costs of guidance, this can provide a public record for future reform efforts. President Reagan’s Executive Order 12291 provides a good model to follow in this regard, in that it put the burden of proof on agencies to demonstrate need for a new rule. Guidance should be held to the same standard.<sup>252</sup>
- Require agencies to present data regarding regulation and guidance to Congress in a form comparable to the federal budget’s Historical Tables.<sup>253</sup> The Reagan and first Bush administrations had something along these lines, a document accompanying the Budget titled the *Regulatory Program of the United States Government*, which included a lengthy appendix, “Annual Report on Executive Order 12291.”<sup>254</sup> This could provide a template for disclosure, along with requiring that guidance appear the *Federal Register* in an accessible way. Other disclosures needed are as follows.
  - **Economically significant guidance.** Require streamlined, one-location online disclosure of economically significant guidance, augmenting what a few executive agencies voluntarily already publish based on the 2007 OMB memorandum to agencies.<sup>255</sup> The chart contained herein, “Table 6: Significant Guidance Documents In Effect: A Partial Inventory,” should expand with information better consolidated, and should incorporate independent agency guidance
  - **Secondary guidance and notices.** Require centralized disclosure of these proclamations, which currently are scattered under numerous monikers and across various websites, if publicized at all. This is a massive undertaking, since thousands of documents of assorted types and varying affect are issued with intent to govern.
- Apply the Administrative Procedure Act’s notice-and-comment requirement to guidance (that some agencies provide an email address to allow input is not sufficient).
- Apply the Congressional Review Act’s 60-day resolution of disapproval process to guidance. If guidance grows, the public can know in which instances Congress could have acted to stop or call attention to it, but did not. Congress should also introduce bills to repeal guidance

It has been a generation since Congress last proposed major downsizing of the federal bureaucracy. This year’s congressional task forces,<sup>256</sup> along with a distinctive statement of principles in the 2017 House budget proposal, are good first steps in voicing the principle of congressional authority over lawmaking and of restricting the federal government to appropriate boundaries.<sup>257</sup>

Guidance documents are not new, but the recent blatant executive branch assertions of power—including boasts regarding unilateral action without Congress—makes addressing their power to impose rules more salient than ever. The solution for executive overreach is for Congress to say no to it. Likewise, the Washington bureaucracy endures because Congress has yet to say no to it. The public should understand that and hold their elected representatives accountable for this surrender of their authority and shirking of their duties.

Usually, despite the common refrain, there ought *not* be a law. Financial stability, Internet access, cybersecurity, competitiveness, food safety, and other good things that agencies purport to safeguard by regulating are also forms of wealth and prosperity. Those values require



something more than the man-made administrative agency behemoths created long ago to nurture and expand them. The modern administrative regulatory state approach does not work, and is increasingly abusive and unaccountable. Free enterprise never meant companies get to run wild, and the competitive process itself has a vital role to play in “regulation.” Real regulation, real discipline, requires something more than the bureaucratic mindset.

## NOTES

<sup>1</sup> This testimony updates Clyde Wayne Crews Jr., “Mapping Washington’s Lawlessness: A Preliminary Inventory of ‘Regulatory Dark Matter,’” *Issue Analysis 2015 No. 6*, Competitive Enterprise Institute, December 2015. <https://cei.org/sites/default/files/Wayne%20Crews%20-%20Mapping%20Washington%27s%20Lawlessness.pdf>; also available on SSRN Social Science Research Network.

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2733378](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2733378).

<sup>2</sup> Remarks by the President and the Vice President at U.S. Conference of Mayors Reception, the White House, January 23, 2014, <https://www.whitehouse.gov/the-press-office/2014/01/23/remarks-president-and-vice-president-us-conference-mayors-reception>.

<sup>3</sup> From the Planck cosmology probe’s 2013 mapping, our universe contains only 4.9 percent ordinary matter. The rest is a quarter dark matter (26.8 percent) and over two-thirds dark energy (68.3 percent). Matthew Francis, “First Planck Results: The Universe is Still Weird and Interesting,” *Ars Technica*, March 21, 2013, <http://arstechnica.com/science/2013/03/first-planck-results-the-universe-is-still-weird-and-interesting/>.

<sup>4</sup> P.L. 79-404.

<sup>5</sup> P.L. 79-404, Section 553. “Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”

<sup>6</sup> Clyde Wayne Crews, Jr., “Despotism-Lite? The Obama Administration’s Rule by Memo,” *Forbes*, July 1, 2014, <http://www.forbes.com/sites/waynecrews/2014/07/01/despotism-lite-the-obama-administrations-rule-by-memo/>. A recent exploration of “ways federal regulatory agencies circumvent formal procedures during the rulemaking process” appears as a series of five studies published by Mercatus Center scholars. For links to all of them, see Media Advisory “Mercatus Releases Five Academic Articles in *Harvard Journal of Law and Public Policy*,” May 23, 2014, [http://mercatus.org/expert\\_commentary/mercatus-releases-five-academic-articles-harvard-journal-law-and-public-policy](http://mercatus.org/expert_commentary/mercatus-releases-five-academic-articles-harvard-journal-law-and-public-policy).

<sup>7</sup> Jerry Brito, “‘Agency Threats’ and the Rule of Law: An Offer You Can’t Refuse,” *Harvard Journal of Law and Public Policy*, Federalist Edition, Vol. 1, No. 1 (2014), [http://www.harvard-jlpp.com/wp-content/uploads/2014/05/37\\_2\\_553\\_Brito.pdf](http://www.harvard-jlpp.com/wp-content/uploads/2014/05/37_2_553_Brito.pdf).

<sup>8</sup> For example see Nathan Cortez, “Adverse Publicity by Administrative Agencies in the Internet Era,” *BYU Law Review*, Vol. 2011, Issue 5, Article 2, December 1, 2011, <http://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=2832&context=lawreview>.

<sup>9</sup> Robert A. Rogowski, Robert A. 1989. “Sub Rosa Regulation: The Iceberg beneath the Surface,” in Roger E. Meiners and Bruce Yandle, eds., *Regulation and the Reagan Era: Politics, Bureaucracy and the Public Interest*, (New York: Homes & Meier, 1989), pp. 209-222.

<sup>10</sup> *Appalachian Power Co. v. Environmental Protection Agency* 208 F.3d 1015 (D.C. Cir. 2000), <https://law.resource.org/pub/us/case/reporter/F3/208/208.F3d.1015.98-1540.98-1542.98-1538.98-1537.98-1536.html>.

<sup>11</sup> Jonathan H. Adler, “Examining the Use of Administrative Actions in the Implementation of the Affordable Care Act,” Testimony before the Subcommittee on Oversight of the Committee on Ways and Means, U.S. House of Representatives, May 20, 2015, <http://waysandmeans.house.gov/wp-content/uploads/2015/06/2015-05-20-Oversight-Adler-Testimony.pdf>. See also John D. Graham and James W. Broughel, “Stealth Regulation: Addressing Agency Evasion of OIRA and the Administrative Procedure Act,” *Harvard Journal of Law and Public Policy*: Federalist Edition, Vol. 1, No. 1 (2014), [http://www.harvard-jlpp.com/wp-content/uploads/2010/01/Graham\\_Broughel\\_final.pdf](http://www.harvard-jlpp.com/wp-content/uploads/2010/01/Graham_Broughel_final.pdf). In a Mercatus Center analysis, Graham and Broughel elaborate: “The bulletin outlined how businesses could stay in compliance during the transition period before reporting requirements and fines would fully kick in. No public feedback was solicited on the bulletin, nor was the

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bulletin accompanied by an economic analysis (known as a regulatory impact analysis or RIA), even though the policy had large economic effects.” Graham and Broughel, “Confronting the Problem of Stealth Regulation,” *Mercatus on Policy*, Mercatus Center, April 13, 2015, <http://mercatus.org/publication/confronting-problem-stealth-regulation>.

<sup>12</sup> Adler.

<sup>13</sup> Jeh Johnson, “Exercising Prosecutorial Discretion with Respect to Individuals who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents,” Memorandum, November 20, 2014,

[http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf).

<sup>14</sup> Barack Obama, “Remarks by the President on the Economy and Housing,” White House Office of the Press Secretary, October 24, 2011, <https://www.whitehouse.gov/the-press-office/2011/10/24/remarks-president-economy-and-housing>.

<sup>15</sup> Obama, “State of the Union Address,” White House, Office of the Press Secretary, January 28, 2014, <http://www.whitehouse.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address>.

<sup>16</sup> Gregory Korte, “Obama’s Executive Action Rollouts Increasing In Pace,” *USA Today*, April 22, 2015,

<http://www.usatoday.com/story/news/politics/2015/04/22/obama-executive-actions-increasing/25828391/>

<sup>17</sup> *Ibid.*

<sup>18</sup> Stephanie Simon, “Obama Faces Power Backlash,” *Politico*, February 1, 2014,

<http://www.politico.com/story/2014/02/barack-obama-executive-power-backlash-102966>.

<sup>19</sup> U.S. Federal Communications Commission, “In the Matter of Protecting and Promoting the Open Internet (GN Docket No. 14-28) Report and Order on Remand, Declaratory Ruling, and Order, adopted February 26, 2015, released March 12, 2015, [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2015/db0312/FCC-15-24A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0312/FCC-15-24A1.pdf).

<sup>20</sup> William Yeatman, “A Primer on Expected EPA Climate Rules,” Competitive Enterprise Institute Blog, July 31, 2015, <https://cei.org/blog/primer-expected-epa-climate-rules>. See also Yeatman, “EPA’s Clean Power Plan Overreach: Agency Does Not Merit Chevron Deference to Implement Burdensome Rule,” *OnPoint* No. 204, Competitive Enterprise Institute, July 28, 2015, <https://cei.org/sites/default/files/William%20Yeatman%20-%20EPA%27s%20Clean%20Power%20Plan%20Overreach.pdf>.

<sup>21</sup> Chris Edwards, “Forget Too Big to Fail ... The Federal Government is too Big to Work,” *Washington Examiner*, July 13, 2015, <http://www.washingtonexaminer.com/the-federal-government-is-too-big-to-work/article/2567987>.

<sup>22</sup> Office of Information and Regulatory Affairs, Office and Management and Budget, RegInfo.gov advanced search, <http://www.reginfo.gov/public/do/eAgendaAdvancedSearch;jsessionid=B3A2661D41F347B94BA3F32EFED6E28>.

<sup>23</sup> U.S. Office of Management and Budget, Office of Information and Regulatory Affairs, *2015 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, October 16, 2015,

[https://www.whitehouse.gov/sites/default/files/omb/inforeg/2015\\_cb/draft\\_2015\\_cost\\_benefit\\_report.pdf](https://www.whitehouse.gov/sites/default/files/omb/inforeg/2015_cb/draft_2015_cost_benefit_report.pdf).

<sup>24</sup> Crews, “Obama’s 2015 Report to Congress on Federal Regulations Is MIA,” CEI Blog, July 22, 2015, <https://cei.org/blog/obama%E2%80%99s-2015-report-congress-federal-regulations-mia>.

<sup>25</sup> David E. Lewis and Jennifer L. Selin, *Sourcebook of United States Executive Agencies*, Administrative Conference of the United States, March 7, 2013. Pp. 138-141,

[https://www.acus.gov/sites/default/files/documents/Sourcebook%202012%20FINAL\\_May%202013.pdf](https://www.acus.gov/sites/default/files/documents/Sourcebook%202012%20FINAL_May%202013.pdf).

<sup>26</sup> *Ibid.*, pp. 14-15.

<sup>27</sup> Sen. Chuck Grassley, Prepared Statement for Senate Judiciary Committee Hearing, “Examining the Federal Regulatory System to Improve Accountability, Transparency and Integrity,” June 10, 2015,”

<http://www.judiciary.senate.gov/imo/media/doc/06-10-15%20Grassley%20Statement.pdf>.

<sup>28</sup> *Federal Register* Agency List, accessed October 23, 2015, <https://www.federalregister.gov/agencies>.

<sup>29</sup> *Federal Register* 2015 Index, accessed July 24, 2015, <https://www.federalregister.gov/index/2015>. (“The count is omitted for agency publishing less than 2 documents in a given year.”)

<sup>30</sup> “Find Documents” advanced search function on Regulations.gov, <http://www.regulations.gov/#!advancedSearch>.

<sup>31</sup> Crews, *Ten Thousand Commandments: A Policymaker’s Snapshot of the Federal Regulatory State*, (various years) Competitive Enterprise Institute: Washington, D.C., <http://www.cei.org/10kc>.

<sup>32</sup> For descriptions of these differences see Maeve P. Carey, “Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register,” CRS Report 7-5700, Congressional Research Service, November 26, 2014, <http://fas.org/sgp/crs/misc/R43056.pdf>.

<sup>33</sup> Council of Economic Advisers, *Economic Report of the President*, Executive Office of the President, January 1980, p. 125, [http://www.presidency.ucsb.edu/economic\\_reports/1980.pdf](http://www.presidency.ucsb.edu/economic_reports/1980.pdf).

<sup>34</sup> Pub. L. No. 96-511, 94 Stat. 2812, codified at 44 U.S.C. §§ 3501–3521.

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<sup>35</sup> P.L. 96-354.

<sup>36</sup> 5 U.S.C. § 801-808.

<sup>37</sup> Carey.

<sup>38</sup> Executive Order 12291, “Federal Regulation,” February 17, 1981, <http://www.archives.gov/federal-register/codification/executive-order/12291.html>.

<sup>39</sup> See Crews, “One Nation Ungovernable? Confronting the Modern Regulatory State,” in Donald J. Boudreaux, ed., *What America’s Decline In Economic Freedom Means for Entrepreneurship and Prosperity*, Fraser Institute and Mercatus Center at George Mason University (2015), pp. 117-181, <http://www.fraserinstitute.org/uploadedFiles/fraser-ca/Content/research-news/research/publications/what-americas-decline-in-economic-freedom-means-for-entrepreneurship-and-prosperity.pdf>.

<sup>40</sup> Executive Order 12866, “Regulatory Planning and Review,” September 30, 1993, <http://www.archives.gov/federal-register/executive-orders/pdf/12866.pdf>.

<sup>41</sup> U.S. Office of Management and Budget, Office of Information and Regulatory Affairs, *Report to Congress On the Benefits and Costs of Federal Regulation* (various years available). [https://www.whitehouse.gov/omb/inforeg\\_regpol\\_reports\\_congress/](https://www.whitehouse.gov/omb/inforeg_regpol_reports_congress/).

<sup>42</sup> The Administrative Procedure Act itself signaled a break with traditional democratic accountability. In his book, *Is Administrative Law Unlawful*, Columbia law professor Philip Hamburger sees the modern administration state as a reemergence of the absolute power practiced by pre-modern kings. Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2014). See also Hamburger’s discussions of administrative law in a summer 2014 *Washington Post* blog series, <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/07/14/prof-philip-hamburger-columbia-guest-blogging-on-his-is-administrative-law-unlawful/>.

<sup>43</sup> U.S. Government Accountability Office, *Federal Rulemaking: Agencies Could Take Additional Steps to Respond to Public Comments*, GAO-13-21, December 2012, <http://www.gao.gov/assets/660/651052.pdf>. The rates are comparable to the fractions of rules found exempt from notice and comment in Connor Raso, “Agency Avoidance of Rulemaking Procedures,” *Administrative Law Review* (forthcoming), February 2015, <http://ssrn.com/abstract=2293455>.

<sup>44</sup> P.L. 79-404. Section 553.

<sup>45</sup> U.S. GAO 2012, Introduction.

<sup>46</sup> *Ibid*.

<sup>47</sup> Rep. Todd Young, REINS Act page, <http://toddyoung.house.gov/reins>.

<sup>48</sup> Curtis W. Copeland, “Congressional Review Act: Many Recent Final Rules Were Not Submitted to GAO and Congress,” Administrative Conference of the United States, July 15, 2014, <https://www.acus.gov/sites/default/files/documents/CRA%2520Report%25200725%2520%25282%2529.pdf>.

<sup>49</sup> *Ibid*. p. 47.

<sup>50</sup> Morton Rosenberg, “Whatever Happened to Congressional Review of Agency Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform,” *Administrative Law Review* (American Bar Association), Vol. 51, No. 4 (Fall 1999), pp. 1066-1067, <http://www.jstor.org/stable/40710052>.

<sup>51</sup> *Ibid*.

<sup>52</sup> John Tamny, “The Enron-Style Accounting that Deprives Americans of Economic Growth,” *Forbes*, June 8, 2014, <http://www.forbes.com/sites/johntamny/2014/06/08/the-enron-style-accounting-that-deprives-americans-of-economic-growth/print/>.

<sup>53</sup> See, for example, Editorial “The Off-Grid Administration,” *Wall Street Journal*, August 31, 2015, <http://www.wsj.com/articles/the-off-grid-administration-1441063961>.

<sup>54</sup> Paul Farhi, “Access Denied: Reporters say federal officials, data increasingly off limits,” *Washington Post*, March 30, 2015, [http://www.washingtonpost.com/lifestyle/style/access-denied-reporters-say-federal-officials-data-increasingly-off-limits/2015/03/30/935b4962-c04b-11e4-ad5c-3b8ce89f1b89\\_story.html](http://www.washingtonpost.com/lifestyle/style/access-denied-reporters-say-federal-officials-data-increasingly-off-limits/2015/03/30/935b4962-c04b-11e4-ad5c-3b8ce89f1b89_story.html).

<sup>55</sup> For example, see President Obama’s tweet on August 24, 2015: “Investing in renewable energy helps fight climate change—and creates jobs. #ActOnClimate,” <https://twitter.com/barackobama/status/635919932371374080>.

<sup>56</sup> Travis Waldron, “STUDY: Contrary to GOP Claims, EPA Regulations Create Jobs,” ThinkProgress. March 7, 2012, <http://thinkprogress.org/economy/2012/03/07/440128/study-contrary-to-gop-claims-epa-regulations-create-jobs/>.

<sup>57</sup> U.S. Department of Labor, “Minimum Wage Mythbusters,” <http://www.dol.gov/minwage/mythbuster.htm>.

<sup>58</sup> White House Office of the Press Secretary, “FACT SHEET: Middle Class Economics Rewarding Hard Work by Restoring Overtime Pay,” news release, June 30, 2015, <https://www.whitehouse.gov/the-press-office/2015/06/30/fact-sheet-middle-class-economics-rewarding-hard-work-restoring-overtime>.

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- <sup>66</sup> Executive Order 13706, “Establishing Paid Sick Leave for Federal Contractors,” September 7, 2015. <https://www.federalregister.gov/articles/2015/09/10/2015-22998/establishing-paid-sick-leave-for-federal-contractors>.
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