The Deregulator-in-Chief

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Donald Trump campaigned on a promise to cut regulations. When he became president, he moved quickly—issuing executive orders to eliminate two regulations for every new one through a novel policy, a "regulatory budget," and to establish a deregulation task force within every federal agency. He also promised to identify and remove onerous regulations on the manufacturing sector—arguably the most regulated sector of the U.S. economy.

In this issue, we highlight our findings from our recent research report, *Trump's Deregulatory Record: An Assessment at the Two-Year Mark*. Our conclusion: the Trump administration is keeping its word when it comes to a major campaign promise to deregulate more quickly and effectively than any of his predecessors. And while evidence is beginning to show that this is happening, some major roadblocks remain.

In undertaking this research, we did not examine the economic, public health, social or environmental impacts of President Trump's deregulation agenda. Thus, we take no stance as to whether the agenda as a whole (or any specific deregulatory action) is good for the welfare of the United States or the world. Our interest is in presidential effectiveness—has President Trump been effective as a deregulator? If not, why? And what steps might he take to bolster his deregulation record?

To answer these questions, we conducted an extensive literature review, interviewed dozens of experts, utilized multiple regulatory and legislative databases, and examined dozens of judicial decisions.

Implementation Issues

Implementation has not gone smoothly. Three issues caught our attention. First, President Trump has been slow to nominate—and the U.S. Senate slow to confirm—regulatory agency leaders. The end result: agencies that produced the most red tape lack the political leadership needed to advance the president's agenda. Although the absence of agency leadership may help to slow down the issuance of new rules or regulations, it also slows down the repeal of existing rules.

Second, the Trump administration has imposed accounting conventions that make it difficult to assess progress on deregulation. For example, the Trump definition of a regulatory action is narrower than that of a deregulatory action. This makes it easier for agencies to comply with the regulatory budget while confusing those who desire an apples-to-apples comparison.

A more fundamental issue is the lack of clear metrics for deregulation. Regulation is seen by the Trump administration as an intrusion on the freedoms of private citizens and enterprises, an intrusion that can be justified philosophically only via explicit authorizations by the U.S. Congress, subject to judicial review for constitutional validity. But how does one measure freedom? Instead of taking on the challenge, the administration uses an imperfect metric of cost savings.

Third, critics contend that the regulatory budget might cause agencies to eliminate good regulations that have large benefits relative to costs in order to make room for new regulations. Such a concern is unwarranted as long as agencies follow a long-standing federal policy that the benefits of a rule must justify its cost. The Trump administration has retained that policy, though it has struggled to meet it. A related concern, not so easily dismissed, is that the regulatory budget discourages agencies from even considering a promising new regulation because of the burden to eliminate two existing regulations.

Progress and Setbacks

Looking closely at the Trump record, we find clear evidence of progress but also indication of setbacks.

With respect to progress, the flow of new regulations has been reduced. Table 1 shows the numbers: Under President Trump, regulatory agencies are issuing fewer new regulations overall, fewer significant regulations (those subject to White House review), and fewer major regulations (those having an impact of $100 million or more on the economy). The total number of final regulations completed under the Trump administration is approximately 40 percent smaller than the number issued by the Bush administration and the Obama administration. The number of significant regulations under President Trump is almost 50 percent smaller than the number issued under Presidents Bush and Obama. For major rules, the counts under both Trump (-53 percent) and Bush (-41 percent) are substantially smaller than the count under Obama.

Table 1. New Rulemakings during a President's First 23 Months.[1]

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

Source: U.S. GAO Federal Role Database and the White House Office of Management and Budget (OMB).

[1] For each administration listed, the numbers refer to rules published in the *Federal Register* from Inauguration Day (January 20) through December 31 of the following year. Rules from both independent and cabinet agencies are included. The GAO Federal Rule Database was accessed January 19, 2019.

*Covers the time period from January 20, 2017 through September 30, 2018.

The Trump administration has also been somewhat effective in working with Congress on legislative acts of deregulation. These have included resolutions of disapproval under the Congressional Review Act and deregulatory provisions inserted as part of newly enacted legislation (e.g., the repeal of the individual mandate under the Affordable Care Act).

Progress toward reviewing and removing the huge body of existing regulations has been slow. There is as yet no evidence that the aggregate number of federal regulations has declined. However, this may be a matter of time—it can take years to eliminate an existing regulation. The Trump administration has hundreds of deregulatory rulemakings underway on a wide range of issues at different federal agencies. The most recent *Regulatory Agenda* reports that 514 deregulatory rulemakings are ongoing or active. This number is larger than what the Reagan administration tackled over a similar time frame.

There are early signs that Trump's deregulatory agenda is being blocked or delayed by decisions of the federal judiciary. The Institute for Policy Integrity (IPI) at New York University School of Law is tracking litigation over President Trump's deregulation efforts. As of January 14, 2019, there were 30 cases in the IPI database. Only two cases were won by the Trump administration and 28 were won by plaintiffs, either by a formal court decision or because the federal government capitulated before a judicial decision was issued. Legal experts say this loss rate is much higher than that experienced by previous administrations. The Trump administration's judicial setbacks have primarily involved attempts to delay the effective dates of rules. A few rules centered on changing

regulatory requirements have also been struck down, primarily for lack of statutory authorization or failure to consider the foregone benefits of the action.

The Trump administration is undertaking several deregulatory actions related to climate change, but those actions are vulnerable to delay or reversal through judicial or legislative interventions. Three of the most significant of these rules (replacing emission limits for power plants, modifying tailpipe standards for new automobiles, and lessoning restrictions on methane pollution) will modify or replace rules adopted by the Obama administration.

An unintended consequence of federal deregulation has been determined growth in some state and local regulations (e.g., on Internet regulation, greenhouse gas limits for motor vehicles, and regulation of industrial chemicals). Some state and local governments are becoming more aggressive in their regulatory policies.

Recommendations

Given the Trump administration's commitment to deregulation, we offer the following recommendations to enhance the effectiveness and durability of the agenda:

The unfilled leadership posts at federal agencies should be filled by the Trump administration as soon as possible. If the administration's only objective is to halt the issuance of new regulations, then regulatory offices without leadership can serve the administration's interests. But because President Trump is determined to remove existing regulations or reform existing regulations to make them less burdensome and intrusive, vacant regulatory posts are a problem that needs to be solved.

When the Office of Management and Budget (OMB) reports the number of deregulatory and regulatory actions, the same types of actions should be counted on the regulatory and deregulatory sides of the ledger. OMB is not currently making apples-to-apples comparisons under the two-for-one executive order. If only significant new regulations are counted as pro-regulatory actions, then only significant deregulatory actions should be allowed to offset them. This recommendation is particularly important for OMB's public communications about progress on deregulation, as the ratios currently reported lack credibility.

New tools are needed to measure the impact of regulatory and deregulatory actions as to their impact on freedom. Not all regulations are equally intrusive, yet the two-for-one accounting system implicitly assumes that they are. Research is needed to develop the tools that can assist agencies and OMB in understanding the extent of regulatory intrusion and deregulatory liberation. OMB should request the National Science Foundation to commission tools-oriented research and development to discover how changes in human freedom due to regulation can be defined and measured.

The foregone benefits of regulation need to be taken seriously in regulatory impact analyses, agency decision making and White House communications about federal regulatory policy. When a regulation is rescinded or made less burdensome or intrusive,

benefits may be foregone that would have occurred if the regulation had been implemented and enforced. Failure of agencies to analyze foregone benefits will undermine public confidence in regulatory analysis and put deregulatory actions at significant risk of judicial and legislative reversal.

The Trump administration should revise its climate rulemakings to make them less vulnerable to judicial reversal. Given the changing composition of the Congress, it should also consider a legislative initiative on climate policy. EPA's final climate rulemakings should be revised to make them more responsive to the agency's 2009 endangerment finding and the additional climate science that has been published since then. The final rules may not need to be as stringent as the Obama-era rulemakings but they need to be responsive to the climate science and based on improved analyses of the benefits of reducing GHGs and related co-benefits.

When devising federal regulatory and deregulatory solutions, the Trump administration should take into account the prospects of future state and local regulations. In our federalist system, a proliferation of conflicting state and local regulations may be the predictable result of a regulatory vacuum at the federal level. On occasion, a negotiated solution between federal and state regulators may be superior to years of unpredictable litigation.

Peer Reviewers: Randall E. Davis, Randall Davis Associates LLC and James W. Conrad Jr., Conrad Law & Policy Counsel.

For further reading:

Keith B. Belton and John D. Graham. *Trump's Deregulatory Record: An Assessment at the Two-Year Mark.* American Council for Capital Formation, Washington, DC. March 2019.