

A ROADMAP TO REPEAL: REMOVING REGULATORY BARRIERS TO OPPORTUNITY



Background

President Trump and the 115th Congress have a unique opportunity to roll back the regulatory state. Under President Obama, there were more than [600 major rules](#)—that each cost more than \$100 million annually—foisted on the American people.

However, the problem is not just the avalanche of Obama-era regulations—it is the slow yet steady accumulation of regulations that have grown under both Republican and Democrat presidents. Between 1980 and 2012, regulations cost the U.S. economy [\\$4 trillion](#), as a result, or approximately \$13,000 per person.

Certain regulations have particular impacts on specific industries, such as [Department of Energy efficiency standards for dishwashers](#). There are also more sweeping regulations that impact the [states](#), the entire labor market, and the economy. These include the [Department of Labor’s overtime rules](#) or the [Environmental Protection Agency’s greenhouse gas rules for power plants, often called the Clean Power Plan](#).

While some regulations may be designed for a targeted industry, the harmful impacts of those regulations can have far reaching consequences – often limiting choice and increasing costs for many businesses and consumers. And these costs are not just monetary; they include compliance costs and added paperwork, opportunities lost, investment decisions distorted, and disruptions in innovation and the development of new technologies. The accumulation of duplicative rules raises the costs of doing business, from labor to energy, and makes everything more expensive. These government intrusions ultimately set up barriers to opportunity that disproportionately hurt the least advantaged.

Congress shares responsibility for the growth of the regulatory state as well. In many cases, Congress has delegated lawmaking authority, often through vague statutes, to agencies that in turn enact thousands of rules with little accountability. Court decisions have also increased the role of agency rulemaking. For example, the doctrine of [Chevron deference](#) was created by a 1984 Supreme Court decision and gives federal agencies broad discretion in interpreting statutes. There are also problems with particular rules that bring courts into play. Multiple Obama-era regulations, for example, are facing court challenges because agencies have overreached even modest legal limits in promulgating rules.

A top priority for the Trump administration and 115th Congress must be repealing the most burdensome regulations and setting our nation on a path of regulatory reform—reform that creates opportunity and economic growth for every American. Some regulations can be repealed more easily than others, but a successful strategy will address both repeal and reform. It will require executive leadership, administrative action, congressional votes, engagement with the courts, and education at the grassroots level.

Types of Regulations

On average, [some 3,000 to 4,000 rules are published](#) each year in the *Federal Register*. The majority of these federal regulatory actions never undergo a regulatory impact analysis (RIA). Even for *major* and *significant* rules¹, when they are reviewed, such analysis falls very short of providing a full measurement of these regulations. In [one study on the quality of agency RIAs](#), the Mercatus Center at George Mason University found that regulatory analysis routinely failed to analyze all pertinent information.

Some executive actions, such as executive orders and presidential memoranda, also published in the *Federal Register*, are never reviewed. These are unilateral directions the president hands down to executive branch agencies that often result in further rulemakings.

Step One: The First 100 Days

Executive Actions and Proposed Regulations

Step one on the road to regulatory repeal addresses these executive actions. Immediately upon taking office, President Trump should unilaterally rescind harmful executive actions and [direct](#) federal agencies to freeze and withdraw from the *Federal Register* proposed rules that have yet to be finalized, as well as rules that have been finalized but have not yet been published. He should also direct new agency heads to refrain from sending new final or proposed rules to the *Federal Register*.

Not only should there be a moratorium issued against promulgating new rules, but agencies should extend compliance deadlines of final but not yet effective rules. This will give agencies time to review and decide if recently finalized rules need to be rewritten.

Lastly, agencies should hold harmless regulated parties while they repeal final rules already in effect. That is, new administration officials should use the enforcement discretion afforded them under the Administrative Procedures Act (APA) and Supreme Court precedent to not enforce some Obama-era rules while they are being rewritten.²

Congressional Review Act

Additionally, Congress and the new president need to work together to repeal major rules finalized late in President Obama's final term. This process is subject to the time constraints set forth in the Congressional Review Act.

The Congressional Review Act (CRA), passed in 1996, established special procedures for Congress to nullify specific rules using a resolution of disapproval that must be passed within 60 legislative days of the regulation being received in Congress. The mechanisms set by the CRA are of unique importance in the U.S. Senate.

The structure and procedures of the Senate ensure that the body functions differently than the House. It is governed by procedures and precedents (more than a thousand) that allow open floor debate generally not present in the House. That means the Senate regularly functions through a series of unanimous agreements to move legislation. Without such an agreement, most bills require 60 votes (cloture) to overcome the procedural rules and permit an up or down vote of the full chamber.

The CRA sets up "fast-track" procedures for Senate consideration of resolutions of disapproval, allowing the Senate to overturn a federal regulation with a simple majority. These "fast-track" procedures allow (after 20 calendar days) a CRA resolution of disapproval to come to the floor if 30 senators support it. After that, any senator may call up the resolution for immediate consideration and it only requires a simple majority to pass. CRA resolutions are therefore said to be "filibuster proof" because they are not subject to a 60-vote threshold required for most other legislation.

If both chambers pass a resolution of disapproval, the president will either sign the resolution, thereby overturning the rule, or send it back to Congress with his veto. Congress would then have the opportunity to attempt to override the veto, which requires a two-thirds, super majority in both chambers. Not surprisingly, the CRA has only been successful in overturning a federal regulation a single time, when the White House changed hands from President Clinton to President Bush.

¹ Major - defined by the Congressional Review Act, as those that the Office of Information and Regulatory Affairs (OIRA) find have an annual effect on the economy of \$100,000,000 or more, result in major cost increases, or are likely to have a significant adverse economic impact (5 U.S.C. section 804(2)). Significant - are defined by Executive Order 12866. They are rules that are likely to have an annual economic effect of at least \$100,000,000, interfere with another agency's action, alter the budgetary impacts of transfer programs, or raise novel legal or policy issues. Economically significant rules are those significant rules that have an annual impact of \$100,000,000 or more (E.O. 12866, section 3(f)).

² See Heckler v. Chaney, 470 U.S. 821 (1985), "an agency's decision not to prosecute or enforce...is a decision generally committed to an agency's absolute discretion." A recent Congressional Research Report (CRS) further explains: "As addressed in Heckler, it seems the agency could be viewed as exercising administrative discretion when it determines that enforcement of the law in a particular situation should not proceed. Because an agency's decision to enforce a statute in a given situation is discretionary..." Found in CRS R43710, Shedd and Garvey, "A Primer on the Reviewability of Agency Delay and Enforcement Discretion," Sept. 4, 2014, <https://fas.org/spp/crs/misc/R43710.pdf>.

The transition to President Trump presents a similar opportunity. The CRA provides a “reset” mechanism – if a rule is issued before 60 legislative days can commence and either chamber adjourns for the session, the 60-day clock for review and disapproval resets 15 days into the next session³. In this transitional year, a lately issued rule by the outgoing Obama administration is subject to disapproval by the 115th Congress and President Trump in early 2017. While the House and Senate parliamentarians are the final arbitrators, it is likely that final rules published after May 2016 will be subject to congressional disapproval under the CRA in the new Congress.

Step Two: Entrenched Regulations

Executive Rulemaking Under the Administrative Procedures Act

The vast majority of President Obama’s regulations were finalized before June 2016 and will require a more exhaustive approach to rescind because they are not subject to review under the CRA.

The federal rulemaking process is governed by several statutes, but chiefly by the Administrative Procedures Act (APA). The APA, which passed in 1946, defines rulemaking as “the agency process for formulating, amending, or repealing a rule.” Generally, agencies engage in one of two types of rulemaking procedures. First, formal rulemaking is used when statute requires “on the record” agency hearings. Formal rulemaking is used less frequently than the second type, informal rulemaking, sometimes called “notice and comment” rulemaking. This is the process whereby agencies submit a notice of proposed rulemaking (NPRM) in the *Federal Register*, solicit and consider public comments, incorporate comments as appropriate, and then publish the final rule in the *Federal Register*.

On its face, the APA process is straight forward, but in practice, repealing finalized regulations is a detailed and time-consuming activity, as demonstrated by the government’s own [regulatory map](#). It is a long process that requires the agency to build an administrative case for the rule that will pass legal muster. There are exceptions to the general APA notice-and-comment requirements, such

as for interim final rules and direct final rules, but those exceptions are “for good cause” and generally for rules considered routine or noncontroversial.

In addition to the APA and CRA, individual statutes may include specific requirements for promulgating rules. For example, the National Environmental Policy Act (NEPA) of 1969 requires federal agencies to include an “impact statement” for “major federal actions significantly affecting the quality of the human environment.”⁴ Importantly, the agency’s environmental impact statements are subject to judicial review. Other statutes that place procedural review-and-analysis requirements on agency rulemaking include the Regulatory Flexibility Act, the Small Business Regulatory Enforcement Fairness Act, the Paperwork Reduction Act, the Unfunded Mandates Reform Act, and the Information Quality Act. Finally, there are presidential directives in place that put requirements on federal agencies that must submit their rules for presidential review. However, as with all executive actions, these directives can change during the new Trump administration.

Finalized rules that are not subject to the CRA will require agencies to engage in this full APA rulemaking process to roll them back. The same reviews, analysis, and justifications that went into making a rule will have to be performed in reverse in order to *unmake* them. Though time-consuming, it is important that new agency heads begin the rulemaking process to unmake the worst of Obama-era regulations early. This is because favorable court decisions and passage of congressional repeal bills are by no means certain.

Legislation

Important issues like Obamacare repeal, budget reconciliation, and Supreme Court nominations will face the 115th Congress in the early months of 2017. But these priorities should not crowd out congressional efforts to provide regulatory relief to all Americans. Even in the face of a Senate filibuster, Congress should devote floor time to vote on bills that repeal and defund the worst of Obama-era regulations.

³ House and Senate parliamentarians determine what constitutes session and legislative days.

⁴ 42 U.S.C. Section 4332 (https://www.fsa.usda.gov/Internet/FSA_File/nepa_statute.pdf)

As mentioned, Congress has been complicit in overly burdening the American people with a vast amount of red tape, but a unique chance now exists to change that trajectory. The American people will not tolerate a squandered opportunity; indeed, they are certain to hold their elected representatives accountable for failure to act to reduce the regulatory burden.

Congressional committees must also open for reform the underlying statutes of regulations. Whole sectors of the economy have experienced a regulatory onslaught through laws signed not by President Obama, but interpreted and executed by his administration. Major environmental laws—Clean Air Act, Clean Water Act, National Environmental Policy Act, Endangered Species Act, Energy Policy and Conservation Act, and Energy Policy Act—should be reformed so that states are able to lead environmental and conservation efforts. The Dodd-Frank and Affordable Care Acts (“Obamacare”) should also be repealed and where regulation is necessary, specific laws passed by Congress to address those circumstances.

Judicial Review

In addition to the unilateral repeal of past executive actions, administrative rulemaking to undo rules, congressional action under the CRA, and consideration of standalone reform bills, President Trump will need to ensure his Justice Department engages the court process to halt unnecessary rules.

Some regulations currently facing court challenges will have to be handled in ways that prevent their implementation. In some instances, that will mean delaying implementation; in others, it will mean asking the court to vacate or remand the rule back to the agency. Still, the Trump Justice Department and other agencies should refuse to defend other Obama administration rules. At times, it might mean accepting a favorable court decision as well.

Federal agency rulemaking will also be subject to court challenge by opponents. It is therefore incumbent upon the administration to do all due diligence as it engages in the rulemaking process to ensure its reviews, analyses, and

justifications for unmaking a rule can pass legal muster.

Step Three: Political Accountability

The American people are weighed down by their own government. Americans will demand accountability from lawmakers who stand in the way of providing much needed regulatory relief. Each stop on the road to regulatory recovery provides a clear view as to who is standing in the way of unleashing freedom and economic prosperity from the clutches of a bloated bureaucracy and heavy handed government.

Organizations like Freedom Partners continue to educate the public about their elected officials in 2018 and beyond.

Examples of Specific Regulations and How They can be Repealed

For reference, below is a detailed list of the types of regulations President Trump and the 115th Congress should begin to address in 2017.

Guidance For Regulations To Remove

Executive Actions The President Can Scale Back Immediately

Rule	Description	Reference
Establishing Paid Sick Leave for Federal Contractors	Requires employers that contract with the federal government to provide paid sick leave to their employees. Carries the unintended consequence of destroying entry-level jobs and locking out some people from the labor market and diminishing the ability of employees to negotiate compensation based on their personal choices.	Executive Order 13706
Planning for Federal Sustainability in the Next Decade	Sets a goal of 40 percent reduction in greenhouse gas emissions across the federal government. Green energy mandates are certain to increase costs, but subsequent climate benefits are less certain.	Executive Order 13693
Climate-Resilient International Development	Requires reduced greenhouse gas emissions in international development projects funded by the American taxpayer. Evaluating emissions increased the use of the scientifically dubious “social cost of carbon” metric.	Executive Order 13677
Fair Pay and Safe Workplaces	Requires companies that bid on federal contracts to disclose legal judgments for disputed labor violations before they have been fully adjudicated. Disclosures of this kind can result in unfair exclusions based solely on disputed legal matters.	Executive Order 13673
Establishing a Minimum Wage for Contractors	Mandates a \$10.10/hour minimum wage to be paid by all federal contractors. Wage mandates are another term for pricing setting that bring unintended consequences of reduced hours, layoffs, and hinder the advancement of lower skilled workers.	Executive Order 13658
Preparing the United States for the Impacts of Climate Change	Requires agencies to improve the federal government’s climate change preparedness directing agencies to take actions now to prevent climate change impacts. Federal mandates to mitigate climate change are costly and largely ineffective at controlling climate patterns.	Executive Order 13653
Establishment of an Interagency Task Force on Commercial Advocacy	Creates a task force to advocate for commercial exports and promotes Export-Import Bank financing. Export-Import Bank cronyism provides special taxpayer subsidies to the connected few and does not advance free trade, competition, or open markets.	Executive Order 13630
Supporting Safe and Responsible Development of Unconventional Domestic Natural Gas Resources	Establishes a working group on natural gas to encourage its use in the transportation sector, provide research and development support and coordination, and devise new rules and mandates for implementation. Federal support for a particular energy resource constitutes government unfairly picking winners and losers; the energy sector should be freed from government intrusion so that businesses can compete on a level playing field.	Executive Order 13605

Updating and Modernizing Overtime Regulations	Directs the Labor Department to promulgate new overtime regulations. The memorandum is the impetus behind the final overtime rule, which substantially increased the salary threshold below which employers must pay overtime. The rule is a major barrier to opportunity for the least advantaged, the very individuals the rule means to help advance. Instead, it will increase the divide between the haves and have nots.	79 FR 15209
Advancing Pay Equality Through Compensation Data Collection	Requires federal contract bidders to disclose compensation data based on specific demographic traits. The mandate is a federal overreach and increased data collection will not grow wage rates for the vast majority of workers.	79 FR 20751
The Paris Climate Agreement	Requires participant countries to reduce their greenhouse gas emissions and results in regulations on the way energy is produced and consumed in the U.S. President Obama unilaterally entered the agreement. The agreement was neither submitted nor ratified as a treaty in the U.S. Senate. President Trump can submit the agreement as a treaty for ratification in the U.S. Senate where it will fail or he can withdraw the U.S. from participation.	UNFCCC
Discretionary Programmatic Environmental Impact Statement to Modernize the Federal Coal Program	Early in 2016, the Department of Interior stopped processing applications for new coal leases on federal lands. The federal government owns nearly half the land in the western part of the United States and with this order has effectively shut down energy development on these lands.	Secretarial Order 3338

Proposed Rules Agencies Should Immediately Withdraw From The Federal Register

Rule	Description	Reference
Proposal to Reissue and Modify Nationwide Permits	USACE administers permits required under Section 404 of the Clean Water Act. Nationwide permits are meant for activities that have minimal environmental impact. Changes to nationwide permitting should be evaluated and made by the new administration.	81 FR 35186
Clean Energy Incentive Program Design Details	Limits carbon emissions and puts requirements on states to do so, as well.	81 FR 42939
Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014	Limits carbon emissions and puts requirements on states to do so, as well.	80 FR 65979
Payday, Vehicle Title, and Certain High-Cost Installment Loans	The rule would require lenders to evaluate applicants' creditworthiness before issuing loans. If finalized, up to 85 percent of such lending would be eliminated, the only source of credit available to some of the least advantaged.	81 FR 47863
Arbitration Agreements	Prohibits financial institutions from requiring mandatory arbitration and would open these institutions to class-action lawsuits.	81 FR 32829

Recently Finalized Rules Subject To The Congressional Review Act

Rule	Description	Reference
Stream Protection Rule	If finalized, the rule would add overly burdensome requirements to attain a permit for coal mining. The regulation would effectively shut down permitting of new coal mines and amounts to government picking winners and losers where the market should determine best source and use of energy.	81 FR 93066
Waste Prevention, Production Subject to Royalties, and Resource Conservation	Establishes unnecessary regulation of oil and gas development on federal lands. It will raise costs and cause wells to be shut in prematurely.	81 FR 83008
Renewable Fuel Standard Program: Standards for 2017 and Biomass-Based Diesel Volume for 2018	Establishes the amounts of renewable fuel that must be blended into gasoline and diesel fuel in accordance with the Energy Policy Act of 2005 as amended.	81 FR 34777
Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2	Establishes miles per gallon fuel efficiency standards for engines sold in the United States. It has been ineffective in reducing greenhouse gas emissions and has resulted in thousands of dollars in per vehicle prices increases.	81 FR 73478
Discrimination on the Basis of Sex	Requires additional paperwork and costs to prove nondiscrimination in employment opportunities and practices.	81 FR 39107
Federal Acquisition Regulation; Fair Pay and Safe Workplaces	Requires employers to submit wage statements to ensure paycheck fairness and overtime payments.	81 FR 58562
Energy Conservation Standards for Small, Large, and Very Large Air-Cooled Commercial Package Air Conditioning and Heating Equipment and Commercial Warm Air Furnaces	Environmental Protection Agency (EPA) conservation standards limit choice and prevent consumers, especially commercial consumers, from acquiring the equipment that best suits their needs.	81 FR 32628
Energy Conservation Standards for Battery Chargers	Ibid	81 FR 38265
Energy Conservation Standards for Dehumidifiers	Ibid	81 FR 56471
Dodd Frank (Disclosure of Payments by Resource Extraction Issuers)	Requires companies engaged in commercial development of oil, natural gas, or minerals to disclose any payments they make to foreign governments or company owned by a foreign government, or the U.S. federal government, for the development of oil, natural gas, or minerals. Disclosure requirements of this kind raise concerns over free speech and First Amendment violations.	81 FR 49359
Dodd Frank (Margin and Capital Requirements for Covered Swap Entities)	Sets capital requirements for insured depository institutions and registered security swap entities.	81 FR 50605

Finding That Greenhouse Gas Emissions From Aircraft Cause or Contribute to Air Pollution That May Reasonably be Anticipated to Endanger Public Health and Welfare	Under authority granted it in the Clean Air Act, the EPA finds that airplane emissions are a danger to the public health and welfare. Federally regulating airplane emissions will increase costs of air travel.	81 FR 54421
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Final Rules Not Subject to the Congressional Review Act

Rule	Description	Reference
Nutrition Standards in the National School Lunch and School Breakfast Programs	Sets stringent school lunch standards for over 98,000 schools and represents federal overreach into decisions that should be made by local school boards and districts.	77 FR 4088
Food Labeling: Calorie Labeling of Articles of Food in Vending Machines	Establishes federal mandates for calorie labeling on food products sold in vending machines. The rule increases paperwork and compliance costs, which could result in higher food prices.	79 FR 71259
Clean Water Rule (Definition of “Waters of the United States”)	Expands federal jurisdictional over waters under the Clean Water Act and results in more government control of private property. Increases permitting requirements and limits private property development.	80 FR 37054
Clean Power Plan (Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units)	Establishes carbon emission limits for each state and the methods whereby those limits can be attained. EPA reached beyond the limits of the Clean Air Act in promulgating the rule and seeks to dictate the way energy is produced and consumed in the United States, raising energy costs and limiting availability for all consumers.	80 FR 64661
2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards	Sets federal mandates for miles per gallon efficiency standards, which can increase vehicle prices and create barriers to consumer choice and market innovation.	77 FR 62623
Net Neutrality (Protecting and Promoting the Open Internet)	Regulates the internet as a utility and grants federal control over internet traffic. Limits how internet companies manage their networks. Consumer choice and market innovation suffer as a result.	80 FR 19737
Employee Retirement Income Security Act (Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice)	Expands fiduciary obligations to include financial advisors engaged in retirement plans or planning and eliminates many commission structures common to the industry. Limits investor options, especially for those with modest means that are trying to save for retirement.	81 FR 20946
Federal Acquisition Regulation: Establishing a Minimum Wage for Contractors	Requires federal contractors to pay a minimum wage of \$10.10 per hour. Federal mandates cannot create sustained wage growth. Additionally, federal contracts must be examined to eliminate overpayments and wasteful spending.	80 FR 75915
Higher Education Act (Program Integrity: Gainful Employment)	Places new requirements on for-profit colleges and universities in order to retain federal funding for student scholarships. Unnecessary regulations burden educational institutions, further entrenches the government monopoly over higher education, and limits educational choices available to the least advantaged.	79 FR 64889

<p>Dodd-Frank (Volcker Rule -- Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds)</p>	<p>The rule prohibits banks from trading securities on their own accounts. The rule limits lending mechanisms available and could result in unintended consequences as financial institutions hedge investments in other ways.</p>	<p>79 FR 5536</p>
<p>Dodd Frank (Regulatory Capital Rules: Regulatory Capital, Implementation of Basel III, Capital Adequacy, Transition Provisions, Prompt Corrective Action, Standardized Approach for Risk-weighted Assets, Market Discipline and Disclosure Requirements, Advanced Approaches Risk-Based Capital Rule, and Market Risk Capital Rule)</p>	<p>Establishes capital requirements for banks of all sizes. Intended for large banks this rule imposes an unnecessary compliance burden on community banks. Consumers, small businesses, and smaller communities will be hurt by this regulation.</p>	<p>78 FR 62017</p>
<p>Dodd Frank (Debit Card Interchange Fees and Routing)</p>	<p>Sets federal caps on debit card swipe fees. Banks pass increased costs on to consumers in other manners, such as elimination of free checking accounts and increased fees elsewhere.</p>	<p>76 FR 43393</p>
<p>American Recovery And Reinvestment Act (Medicare and Medicaid Programs; Electronic Health Record Incentive Program)</p>	<p>Creates potential patient privacy violations by establishing federal funds incentivizing the logging of electronic patient records.</p>	<p>75 FR 44313</p>
<p>Affordable Care Act (Establishment of Exchanges and Qualified Health Plans; Exchange Standards for Employers)</p>	<p>Establishes federal standards and mandates for states establishing health exchanges under the Patient Protection & Affordable Care Act.</p>	<p>77 FR 18309</p>
<p>Overtime Rule (Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees)</p>	<p>Increases the salary threshold below which employers must pay overtime. The rule is a major barrier to opportunity for the least advantaged and it will increase the divide between the haves and have nots.</p>	<p>81 FR 32391</p>