



Insight

The Regulatory Budget: How Many “Discretionary” Rulemakings Exist?

SAM BATKINS | APRIL 27, 2017

With the formulation of a [regulatory budget](#) in the U.S., a system that requires the amendment or repeal of at least two regulations for every new significant rule, there is now an incredible incentive to identify outdated and ineffective rules. The American Action Forum (AAF) has produced a “[library](#)” of existing research on retrospective review and now agencies will have to identify old rules to amend in order to achieve the goal of \$0 in net regulatory costs by the end of the fiscal year.

According to former White House official [Marcus Peacock](#), agencies will likely prioritize “discretionary” rulemakings, or measures that don’t have a firm statutory hook or judicial mandate. For instance, [Section 1504](#) of Dodd-Frank mandates companies disclose information about resource extraction payments to foreign governments. There is little discretion in the statute. By contrast, the Department of Labor’s (DOL) “[Fiduciary](#)” rule lists [multiple sections](#) of the Employee Retirement Income Security Act to make the case for its authority to regulate. This isn’t to say all discretionary rulemakings are legally dubious, just that as agencies had discretion to implement them initially, it will be easier for agencies to make changes in the future without firm statutory prescriptions.

Based on AAF research of more than 4,000 regulations since 2005, there are at least 146 “economically significant” discretionary rulemakings regulators could address today. Combined, they impose \$62 billion in annual costs and generate 61 million paperwork burden hours. These discretionary old rules could serve as fertile grounds for retrospective review and possible repeal. The administration has already begun examining many of the most controversial and expensive measures.

Methodology

There is no definitive definition of a “discretionary” rule, but reginfo.gov does offer several clues to narrow the list of candidates. For this research, AAF used the reginfo.gov search function for economically significant final rules published between January 1, 2005 and April 5, 2017. To capture as many discretionary rules as possible, none of the regulations in the initial sample (of 223 rules) had a statutory or judicial deadline. However, this only means there was no firm timeframe for the completion of a rule, either from a statute or from a court. The regulatory [budget guidance](#) released by the administration identifies exempt rules as those only with, “an explicit requirement and explicit timeframe for rulemaking.” AAF also excluded these required rules from the sample.

The second phase of winnowing the list of discretionary measures involved research of every remaining regulation. If, for example, the Unified Agenda entry listed [clear and specific](#) references to a statute mandating the regulation, it was excluded from the sample. Other rulemakings, however legal, generally used the broad power of multiple statutes and [varied authority](#) to justify new rules; for these rulemakings, AAF labeled them as discretionary.

Results

The final sample included 146 significant rules issued between 2005 and 2016. Many of the largest rulemakings on the list are already being addressed by the Trump Administration. There are 12 [billion-dollar](#) regulations on the discretionary tally, or roughly half of all billion-dollar rules issued during the Obama Administration. Below is a list of the largest “discretionary” rules from the past (by annual cost).

1. [2017-2025 CAFE Standards](#): \$10.8 billion
2. [Clean Power Plan \(CPP\)](#): \$8.4 billion
3. [Fine Particle Implementation Rule](#): \$7.9 billion
4. [2012-2016 CAFE Standards](#): \$4.9 billion
5. [ICD Compliance Date](#): \$4 billion
6. [GHG Standards for Trucks, Phase II](#): \$2.5 billion
7. [Fiduciary Rule](#): \$1.9 billion
8. [Tier 3 Vehicle Gasoline Standards](#): \$1.5 billion
9. [Disaster Loan Program](#): \$1.3 billion

10. [Health Insurance Portability](#): \$1.1 billion

From the list above, the administration has [addressed](#) the last stage of CAFE standards, the [Clean Power Plan](#), and the [Fiduciary](#) rule. It will take at least one to two years to unwind these measures through the regulatory process and confront likely lawsuits.

The above rules, although expensive, do not represent all of the notable discretionary rulemakings that the administration might review under its regulatory budget. For example, EPA's 2016 fracking standards are also under review ([\\$530 million in costs](#)), as is the controversial "Waters of the U.S." (WOTUS) final regulation from EPA ([\\$463 million in costs](#)). To some extent, this represents the most recent, low-hanging fruit for the administration.

For the regulatory budget to succeed, regulators will have to identify [at least 80](#) regulations for amendment or repeal annually. This will require a more searching inquiry than just the most controversial measures from the Obama Administration. Here are other notable discretionary measures that could be addressed through the administrative process:

- Labor's Workplace Silica Standards: [\\$1 billion](#) in costs
- Energy's Efficiency Standards for Fluorescent Lamps: [\\$841 million](#) in costs
- Education's Gainful Employment Rule: [\\$433 million](#) in costs
- Labor's Overtime Rule: [\\$304 million](#) in costs
- Interior's Methane Flaring Rule: [\\$279 million](#) in costs
- EPA's Cross-State Air Pollution Rule Update: [\\$66 million](#) in costs

Combined savings from just the six rules above could approach \$3 billion. Adding possible benefits from amendment of the CPP could push annual cost reductions past \$10 billion. This is money agencies must find to offset new regulatory programs. For generally active agencies like EPA and HHS, these savings could be essential.

Yet, there are significant implementation hurdles. Namely, for sufficiently old regulations, the administration will request a new program evaluation or impact analysis on the actual costs and benefits of the rule. Agencies might not be able to rely on the original, prospective analysis of cost and benefits. Furthermore, what once looked promising, perhaps high annual costs, might not have come to fruition. An agency might identify an old rule for amendment, but upon further review, the costs could have fallen drastically; this makes offsetting the burden of a new rule more difficult.

For older rules, those from the Bush Administration, it is possible many of the burdens will have already been imposed (sunk costs). Generally, the highest cost is imposed in year one, or even before, when there is a transition in the industry to comply. These costs can take the form of high prices, lower investor returns, or reduced wages and fewer employees. These sunk costs cannot be used as regulatory offsets as part of the one-in, two out regulatory budget. Furthermore, there will be little urgency from industries to repeal rules with past sunk costs and insignificant ongoing burdens. Thus, even if the rules above have eye-popping regulatory cost figures, after time, it does not guarantee that they will contribute to offsetting new burdens.

Finally, even though these new rules might be “discretionary,” they are not insulated from lawsuits. There is no doubt plans to unwind the CPP and WOTUS will trigger litigation from public interest groups. Even less high-profile regulations from the past have special interests that once pushed those rules across the finish line and they will be invested in continuing these programs. However, in favor to the administration, some of the biggest deregulatory actions of the last decade have been amendments to existing rules, eliminating reporting and [recordkeeping requirements](#). That path contributes to regulatory budget implementation because it reduces costs while also blunting the potential for losing in court because the regulatory requirement remains.

Conclusion

In the next few months, a regulatory budget will take form. Agencies will begin to identify “outs” under the one-in, two-out system and offset the costs of new rules. Using discretionary rulemakings from the past is just one path that agencies could take to reduce regulatory burdens. Based on AAF research, this universe of rules has \$62 billion in possible cost offsets and more than 61 million paperwork burden hour savings.