

What's the Difference between "Major," "Significant," and All Those Other Federal Rule Categories?

A Case for Streamlining
Regulatory Impact
Classification

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Executive Summary

Bureaucracy, rather than interaction with elected representatives, dominates the relationship of the individual to the government. The number of rules promulgated by executive branch agencies far outstrips the number of laws passed by Congress, which makes getting a handle on the impact of federal regulation daunting. Further complicating the federal regulatory enterprise is an array of official designations of rule types and effects. Some types of rules are defined in legislation; some in executive orders; other designations were the creations of administrators.

Not knowing what to call regulatory actions nor how to clearly disclose their impact is a significant but artificially created obstacle to addressing regulatory overreach. As the administrative state grows, it becomes increasingly difficult to discern the significance of the various kinds of significant and major rules—as well as of the myriad seemingly minor rules. Policy makers need to increase democratic accountability for the rules and mandates with which Americans contend by reclaiming its Article I lawmaking power and ending over-delegation to the executive branch.

To facilitate this, lawmakers should inventory and simplify the federal bureaucracy's increasingly confusing nomenclature, which includes rule categories

like "major," "non-major," "significant," "economically significant," and numerous others. That streamlining must also extend to guidance documents, memoranda, interpretive bulletins, and other issuances that agencies use to implement policy without going through the Administrative Procedure Act's notice-and-comment rulemaking requirements.

Reporting on rules, especially on major ones, could be refined by deciding between the terms "significant" or "major" rules to create more uniformity, by greatly expanding reporting of guidance, and by subjecting guidance to reforms that treat guidance and other policy-implementing agency documents like ordinary rules.

The streamlined categories could be given greater clarity by assigning cost estimate tiers to rules—such as for example, those with estimated annual costs above \$50 million and below \$100 million, above \$100 million and below \$150 million, and so on. Further clarity would come from segregating regulations by categories such as paperwork, economic, social, safety, environmental; and those addressing agency internal operations.

This regulatory complexity helps preserve a large, unwieldy, and unaccountable bureaucracy that deadens our economy and society. It is time for some nomenclature scrubbing.

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Introduction

Bureaucracy, rather than interaction with elected representatives, dominates the relationship of the individual to the government. The number of rules promulgated by executive branch agencies far outstrips the number of laws passed by Congress. During calendar year 2016, Congress enacted 214 laws, while agencies issued 3,853 rules. That means agencies issued 18 rules for every law passed by Congress. The average annual ratio over the past decade has been 27.¹

The sheer number of rules alone makes getting a handle on the impact of federal regulation daunting, but the challenge does not end there. Further complicating the federal regulatory enterprise is an array of official designations of rule types and their effects.

Policy makers should increase democratic accountability for the rules and mandates Americans have to comply with. Congress should restore its Article I lawmaking power and end over-delegation to the executive branch. To facilitate that, lawmakers need to inventory and simplify the federal bureaucracy's increasingly confusing nomenclature, which includes rule categories like "major," "non-major," "significant," "economically significant," and many others.

This proliferation of regulatory impact nomenclature obscures where it is intended to clarify. It perpetuates a larger administrative state. Thus, it creates ever more unserviceable administrative law, publications, interpretations, and

government jobs than should exist in a free society.

A helpful prerequisite for regulatory reform would be to consolidate and simplify the rule categorizations and clarify their meaning. That streamlining should extend to guidance documents, memoranda, interpretive bulletins, and other issuances that agencies use to implement policy without following the Administrative Procedure Act's (APA) notice-and-comment rulemaking requirements.

Time for Some Nomenclature Scrubbing

In the beginning, there was the "rule."² Born alongside the rule were "interpretative" rules (also known as "interpretive" rules, today often called guidance). After two generations, "major rules" appeared. In due course, "significant regulatory actions" emerged, as did their bulkier "economically significant" brethren. Today, there are so many kinds of rule classifications that they have become indecipherable not only to mere mortals, but to regulators themselves.

The many names of the many kinds of federal regulations complicate efforts to reform the federal regulatory enterprise, especially as regulators have incentives to regulate via the least-scrutinized methods, such as by avoiding the "significant" classification or by issuing guidance documents and memoranda rather than formal rules.³

Today, there are so many kinds of rule classifications that they have become indecipherable not only to mere mortals, but to regulators themselves.

The adoption of crisscrossing and overlapping designations over time makes regulatory practice today an insider's game.

It is time for some nomenclature scrubbing. Some types of rules are defined in legislation, some in executive orders; other designations were the creations of administrators. This complexity helps maintain the large, unwieldy, and undemocratic bureaucracy that deadens our economy and society.

Rules for Rulemaking: A Burst on the Administrative State's Parameters

The following overview of the regulatory oversight regime highlights instances when kinds of rules and their treatment was first demarcated. The adoption of crisscrossing and overlapping designations over time makes regulatory practice today an insider's game.

Administrative Procedure Act (1946)

Offspring: "rule," "interpretative rule"

The basis of the modern federal regulatory apparatus is the Administrative Procedure Act of 1946 (P.L. 79-404⁴). The APA established the process (Section 553) of advance notification of rulemaking and opportunity for the public to provide comment on a published proposed rule before it is finalized in the *Federal Register*.⁵ However, the APA's rulemaking process allows for a great deal of wiggle room via its "good cause" exemption, which allows an agency to deem notice and comment for certain rules as "impracticable, unnecessary, or contrary to the public interest."⁶ Further, "interpretative rules" (often called

guidance) and "general statements of policy" on internal agency matters are not subject to notice and comment. Interestingly, the word "regulation" does not appear in the APA.

Regulatory Flexibility Act (1980)

The Regulatory Flexibility Act (RFA), signed by President Jimmy Carter in 1980, directed federal agencies to prepare regulatory flexibility analyses to assess certain of their rules' effects on small businesses and to describe regulatory actions under development "that may have a significant economic impact on a substantial number of small entities."⁷

The Act did not name types of rules, but is noteworthy for a couple reasons. First, it ushered in the terms "significant" and "economic," which have become central in modern regulatory review. Second, the RFA created the twice-yearly "Regulatory Agenda," a reporting instrument shortly afterward supplemented by President Ronald Reagan's Executive Order 12291, which itself contributed to the expansion of regulatory taxonomy.

Executive Order 12291 (1981)

Offspring: "regulation," "major rule," reaffirms "rule"

A more activist central regulatory assessment and review process was formalized by President Reagan and implemented by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB). OIRA had been created earlier by the Paperwork Reduction Act of 1980, which had been signed into law

by President Carter.⁸ OIRA's founding charge was reducing governmental and private sector paperwork burdens. President Reagan expanded its authority in 1981 with Executive Order 12291 on "Federal Regulation."⁹ The order directed that OIRA, acting as central reviewer, evaluate agencies' rules and analyses, and that any new "major" executive agency regulation's benefits "outweigh" costs where not prohibited by statute, and that agencies prepare a regulatory impact analysis (which could be combined with the already required regulatory flexibility analysis) "in connection with every major rule." Independent agencies, while subject to the APA's notice-and-comment requirement, are not subject to enforceable regulatory review under executive orders.¹⁰

Executive Order 12866 (1993)

Offspring: "regulatory action," "significant regulatory action," and (indirectly) "economically significant," reaffirms "regulation" and "rule"

On September 30, 1993, President Bill Clinton replaced Reagan's Executive Order 12291 with Executive Order 12866, "Regulatory Planning and Review," which largely still governs today.¹¹ The order retained the central regulatory review structure but weakened central review by "reaffirm[ing] the primacy of Federal agencies in the regulatory decision-making process."

The Reagan criterion that benefits should "outweigh"¹² costs became a weaker stipulation that benefits "justify"

costs.¹³ The order retained requirements for executive branch—not independent—agencies to assess costs and benefits of "significant" proposed and final regulatory actions, conduct cost-benefit analysis of what are now referred to as "economically significant" (those with \$100 million or more in estimated annual economic impact), and assess "reasonably feasible alternatives" for OIRA to review.

Reagan's Regulatory Agenda became supplemented by the Regulatory Plan (along with the Unified Regulatory Agenda "of the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter." E.O. 12866 also declared that for purposes of preparing the Regulatory Agenda, "the term 'agency' or 'agencies' shall also include those considered to be independent regulatory agencies."¹⁴

Independent agencies remained exempt from preparing regulatory impact analysis for significant regulatory actions.

Unfunded Mandates Reform Act (1995)

Offspring: a statutory characterization of "regulation," reaffirms "rule" and "significant regulatory action"

While it did not introduce new terms, another reform affecting the regulatory oversight process was the Unfunded Mandates Reform Act (UMRA) of 1995 (P.L. 104-4).¹⁵ Dubbed "S. 1" in the Senate, the legislation was driven largely by complaints from local and state government officials about Washington

rules and mandates disrupting their jurisdictions' budgetary priorities. The bill required the Congressional Budget Office to produce cost estimates of a regulation or rule (using the APA's meaning) imposing mandates that affect state, local, and tribal governments that it determines to rise above a then-\$50 million threshold (now \$77 million) and the private sector by over \$100 million.

The U.S. Government Accountability Office (GAO) has noted numerous exceptions to the requirement to conduct analysis under UMRA over the years, which have undermined its usefulness.¹⁶ For example, while the \$100 million threshold for preparing detailed "written statements" appears, the requirement holds only "before promulgating any final rule for which a general notice of proposed rulemaking was published." Proposed rulemakings often are not published in the first place, so the statements are sometimes not triggered.¹⁷ Also, as the Congressional Research Service has noted, the \$100 million applies to "expenditures" imposed on lower-level governments or the private sector, which are different from the less direct economic effects that help determine rule significance.¹⁸

Congressional Review Act (1996)

Offspring: a statutory definition of "major rule," reaffirms "rule"
The 1996 Congressional Review Act (CRA) requires agencies to submit to both houses of Congress and to the

Comptroller General of the Government Accountability Office "a copy of the rule" (which includes guidance as well) and a descriptive statement including whether or not it is "major."¹⁹ The CRA was passed with significant bipartisan support as Section 251 of the Contract with America Advancement Act, which also contained the Small Business Regulatory Enforcement Fairness Act, which itself updated the Regulatory Flexibility Act.

Under CRA, the GAO submits reports to Congress on major rules—those with at least \$100 million in estimated annual costs—that are maintained in a GAO database.²⁰ The CRA gives Congress 60 legislative days to review a final major rule and pass a resolution of disapproval, which gets expedited treatment in the Senate. The CRA is one of the more important recent affirmations of congressional authority over regulation, but until the Trump administration's rejection of 14 rules as of August 2017, only one rule had been rejected—a Labor Department rule on workplace repetitive-motion injuries in early 2001. Agencies often fail to submit final rules properly to the GAO and Congress, as required under the law.²¹

Regulatory Right-to-Know Act (2000)

Offspring: "non-major rule," reaffirms "major rule"
Passed as part of the Treasury Department appropriations bill in 2000,²² the

Regulatory Right-to-Know Act formalized in statute the requirement for OMB to prepare an annual report to Congress “containing an estimate of the total annual costs and benefits of Federal regulatory programs, including rules and paperwork”:

- In the aggregate;
- By agency, agency program, and program component; and
- By major rule.²³

This annual submission, the primary federal government document outlining some costs and benefits of major rules to the public, is now called *Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act*.²⁴

Executive Order 13422 and OMB Director Portman Bulletin on Guidance (2007)

Offspring: “guidance document,” “significant guidance document,” “economically significant guidance document”

President George W. Bush’s Executive Order 13422, amending President Clinton’s E.O. 12866, required identifying “the specific market failure” that regulations were presumed to address rather than general ones. The new order also subjected significant guidance to OMB review by stipulating that agencies provide OIRA “with advance notification of any significant guidance documents.”²⁵

Rob Portman, OMB director at the time and now a Republican senator from Ohio, issued shortly thereafter the 2007 Final Bulletin for Agency Good Guidance Practices—in effect, guidance for guidance.²⁶ With respect to “significant guidance documents,” and “economically significant guidance documents,” some executive—though not typically independent—agencies comply or make nods toward compliance with the Good Guidance Practices (GGP), which include elements such as public participation, review, transparency, and publishing some of their guidance documents online. But like non-major rules or those not deemed significant, there is a great deal of lesser agency-issued guidance or potentially undeclared significant guidance that is not reviewed.²⁷

Obama Executive Orders on Regulation

President Obama’s Executive Order 13497 revoked Bush’s E.O. 13422 on guidance early in his presidency, but in March 2009, then-OMB Director Peter Orszag issued a memorandum to “clarify” that “documents remain subject to OIRA’s review under [longstanding Clinton] Executive Order 12866.”²⁸

In 2011, President Obama issued three executive orders regarding regulation:

- Executive Order 13565, “Improving Regulation and Regulatory Review,” which reaffirmed Clinton’s Executive Order 12866 and expressed a pledge to address unwarranted

There is a great deal of lesser agency-issued guidance or potentially undeclared significant guidance that is not reviewed.

The Regulatory Accountability Act, seeks “[t]o reform the process by which Federal agencies analyze and formulate new regulations and guidance documents.”

federal regulation.²⁹ The president achieved a few billion dollars in savings, even wisecracking in the 2013 State of the Union Address about a rule that had categorized spilled milk as an “oil.”³⁰

- Executive Order 13579, “Regulation and Independent Regulatory Agencies,” called on—though did not mandate— independent agencies to improve disclosure.³¹ As noted, independent agencies, while they are subject to the APA’s notice-and-comment requirement are not subject to enforceable regulatory review. A president cannot change congressional directives with respect to independent agencies, but can use the bully pulpit to discourage their excesses.
- Executive Order 13610, “Identifying and Reducing Regulatory Burdens,” on public participation and priorities in retrospective regulatory review.³²

In all, four of President Obama’s executive orders addressed over-regulation and rollbacks and the role of central reviewers at OIRA.

Trump Executive Orders on Regulation

President Donald Trump’s initial executive actions have largely halted issuance of costly new regulations to date. Trump began with a “Regulatory Freeze Pending Review” memorandum

to executive branch agency heads from then-White House Chief of Staff Reince Priebus,³³ which also applied to guidance documents, a unique development.³⁴ This was followed by E.O. 13771, “Reducing Regulation and Controlling Regulatory Costs,” to require removal of at least two rules for every new one issued and to cap regulatory costs for the fiscal year, which also applied to significant guidance.³⁵ Finally, E.O. 13777, “Enforcing the Regulatory Reform Agenda,” established Regulatory Reform Officers and Regulatory Reform Task Forces within agencies.³⁶ Two separate memoranda from acting OIRA management with instructions for implementation of E.O. 13771 were also issued, and they explicitly covered guidance as well as rules.³⁷

Regulatory Accountability Act (2017)

(House-passed, Senate pending)

Offspring (if enacted): statutory definition of “guidance” “major guidance,” “high-impact rule; reaffirms/updates “major rule”

The Regulatory Accountability Act, which passed the House in the current (115th) Congress but not yet the Senate, seeks “[t]o reform the process by which Federal agencies analyze and formulate new regulations and guidance documents.” The Senate version was introduced on April 26 with bipartisan support.³⁸ To a considerable extent, this legislation would codify elements of the regulatory review executive orders discussed above.

In so doing, it could consolidate the “rule-types” lexicon under discussion here.

Rule Classifications and Reporting Requirements Specified in the Preceding Laws and Executive Orders

Table 1 lists the many designations now defined and used in both legislation and executive orders, plus the newer characterizations of the Regulatory Accountability Act that could supplement or replace them. Some detail now follows.

“Rule”

The Administrative Procedure Act of 1946 formalized the meaning of the term “rule” in 5 USC Section 551:³⁹

“[R]ule” means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing ...

In formalizing central OMB oversight, Reagan’s 1981 E.O. 12291 defined a rule or regulation similarly, as “an agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the procedure or practice requirements of an agency.”

This wording would appear to include interpretive guidance and policy statements, but those were not the major focus of the oversight process. Clinton’s E.O. 12866 contained a similar definition, but its inclusion of the phrase “which the agency intends to have the force and effect of law”⁴⁰ would appear to exclude non-legally binding guidance, including interpretive rules and policy statements.⁴¹ Still, OIRA occasionally reviews notices issued by agencies.

UMRA defined “regulation” or “rule” as having “the meaning of ‘rule’ as defined in section 601(2) of title 5, United States Code.” That portion of the code set up the Administrative Conference of the United States (ACUS), where in turn the definition referred back to the original APA definition with certain exclusions:

“[R]ule” means any rule for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) of this title, or any other law, including any rule of general applicability governing Federal grants to State and local governments for which the agency

TABLE: Operative/Definitional Presence of Regulatory/Guidance Classification (Beyond APA's "Rule") in Law or Executive Order and Presentation/Classification of Rule Type in Annual Reporting Vehicle

| Law or Executive Order | Economically Significant | Major Rule | Significant Regulatory Action | Other Significant | Significant/ Substantive (but no "majors") | Non-Major | Substantive, Nonsignificant | Routine and Frequent | Routine/ Informational/ Other | Informational/ Administrative/ Other | "Interpretative" ("Guidance Document") | Significant Guidance Document | Economically Significant Guidance Document | Major Guidance |
|---|--------------------------|------------|-------------------------------|-------------------|--|-----------|-----------------------------|----------------------|-------------------------------|--------------------------------------|--|-------------------------------|--|----------------|
| 1946 Administrative Procedure Act | | | | | | | | | | | ✓ | | | |
| 1981 E.O. 12291 (Reagan) | | ✓ | | | | | | | | | | | | |
| 1983 E.O. 12866 (Clinton) | | | ✓ | | | | | | | | | | | |
| 1995 Unfunded Mandates Reform Act | | | ✓ | | | | | | | | | | | |
| 1996 CRA/Small Business Administration Regulatory Enforcement Act | | ✓ | | | | | | | | | ✓ | | | |
| 1999 Regulatory Right-to-Know Act | | ✓ | | | | ✓ | | | | | | | | |
| 2007 E.O. 13422 (Bush) | | | | | | | | | | | ✓ | ✓ | | |
| 2007 OMB Portman Guidance Memo | | | | | | | | | | | ✓ | ✓ | ✓ | |
| 2017 E.O. 13771 and guidance (Trump) | | | ✓ | | | | | | | | | ✓ | | |
| 2017 Regulatory Accountability Act (draft) | | ✓ | | | | | | | | | ✓ | | | ✓ |
| Annual Reporting Medium | | | | | | | | | | | | | | |
| Unified Agenda | ✓ | | | ✓ | | | ✓ | ✓ | | ✓ | | | | |
| OMB C/B Report to Congress | | ✓ | | | | | | | | | | | | |
| GAO reports and database | | ✓ | | | ✓ | ✓ | | | ✓ | | | | | |

provides an opportunity for notice and public comment, except that the term “rule” does not include a rule of particular applicability relating to rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or to valuations, costs or accounting, or practices relating to such rates, wages, structures, prices, appliances, services, or allowances.⁴²

The Congressional Review Act, enabling resolutions of disapproval, defines a “rule” as having “the meaning given such term in section 551.” This has been noted by scholars, such as ACUS’ Morton Rosenberg as the adoption the broadest definition of “rule” in the sense of covering guidance documents as well.⁴³

Legislative history generated during passage shows that Congress intended the CRA to apply to non-traditional “interpretive” rulemaking.

Interpretative Rules

“Interpretative” rules, now routinely called “interpretive,” date back to the APA. These are “rules,” but are defined in a way that avoids the requirement for public notice and comment. While not legally binding, agencies increasingly use them as functionally binding decrees to influence policy and activity without undergoing notice and comment.

Along with the common phrase “guidance documents,” the names by which these

interpretive proclamations go are varied and include memoranda, notices, bulletins, circulars, and more. These even deeper sub-classifications and terms compound the ordinary rule and guidance designations covered in this report.⁴⁴ The Trump administration included interpretive guidance in its initial regulatory freeze and in its agency directives on enforcing E.O. 13771.

Major Rule

Reagan’s Executive Order 12291 required all rules, defined as such in the APA, to be submitted to OMB for review. Regulatory impact analyses were required for the major rules among them. This Reagan order is the origin of the \$100 million annual cost threshold for major rule classification, defined like this in E.O. 12291:

“Major rule” means any regulation that is likely to result in:

- An annual effect on the economy of \$100 million or more;
- A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
- Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.⁴⁵

Legislative history shows that Congress intended the CRA to apply to non-traditional “interpretive” rulemaking.

The definition of “major rule” and the \$100 million threshold for major rule designation was codified for the first time in the 1996 Congressional Review Act.

The OIRA administrator also was empowered to make the “major” determination: “To the extent permitted by law, the Director shall have authority, subject to the direction of the Task Force, to ... [d]esignate any proposed or existing rule as a major rule.”⁴⁶

Twice-yearly (April and October) reporting on rules began with publication of the Regulatory Agenda, which was added as a requirement to the Administrative Procedure Act by the 1980 Regulatory Flexibility Act.⁴⁷ The RFA had already requested information on rules “likely to have a significant economic impact on a substantial number of small entities.”⁴⁸ E.O. 12291 built upon this by calling for editions of the Regulatory Agenda that “may be incorporated” with the Regulatory Flexibility Act agendas, with the emphasis on major rules, requiring at minimum, a “summary of the nature of each major rule being considered.”⁴⁹ Interestingly, President Clinton’s Executive Order 12866 does not mention or use the term “major” at all, instead employing the term “significant regulatory action.”

Subsequently, the definition of “major rule” and the \$100 million threshold for major rule designation was codified for the first time in the 1996 Congressional Review Act, with a definition identical to that of E.O. 12291.⁵⁰

Independent agencies were included in the CRA definition of a covered

“agency.” The only exception was that Federal Communications Commission rules were excluded from the definition of a “major rule”: “The term [major rule] does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act.”⁵¹ This exempted FCC rules from the 60-calendar-day delay for major rules, but FCC rules are covered by the other provisions of the CRA, including the process for overturning them through expedited procedures.

The term “major rule” appeared again in the 2000 Regulatory Right-to-Know Act, which required the annual submission to Congress of “an accounting statement and associated report” containing cost and benefit estimates in the aggregate, by agency and program, and by major rule, among other information.⁵² The OMB asserted in its reports that “[t]he Regulatory Right-to-Know Act does not define ‘major rule’” and used a broader set of criteria to define major rules:

For the purposes of this Report, we define major rules to include all final rules promulgated by an Executive Branch agency that meet at least one of the following three conditions:

- Rules designated as major under 5 U.S.C. § 804(2);1 [Congressional Review Act]
- Rules designated as meeting the analysis threshold under the Unfunded Mandates Reform Act of 1995 (UMRA); or

- Rules designated as “economically significant” under section 3(f)(1) of Executive Order 12866.⁵³

The Right-to-Know Act “defines” major rule by referring back to the CRA’s definition, just as the OMB itself did (in the first bullet above).

The latest effort at defining a major rule is the Regulatory Accountability Act of 2017.⁵⁴ As noted, the RAA has passed the House but not yet the Senate at this writing.⁵⁵ In the Act’s proposed, updated definition of major rule, “likely to result in” \$100 million in annual effects becomes “likely to cause,” and the dollar threshold becomes subject to adjustment. Here is the proposed definition (alpha-numerics omitted):

“[M]ajor rule” means any rule that the Administrator determines is likely to cause—an annual effect on the economy of \$100,000,000 or more, adjusted once every 5 years to reflect increases in the Consumer Price Index for All Urban Consumers, as published by the Bureau of Labor Statistics of the Department of Labor. ...⁵⁶

The remainder of the longstanding major rule definition elements, those regarding cost increases and adverse effects, remains intact in the RAA. The RAA would also introduce a new term to the rule lexicon, “high-impact rule”—one with estimated annual effects of \$1 billion or more.

Non-Major Rule

Non-major rules are not defined, except by exclusion. According to the Regulatory Right-to-Know Act, “the term ‘nonmajor rule’ means any rule, as that term is defined in section 804(3) of title 5, United States Code, other than a major rule.” That is in turn a reference back to the CRA, where non-major rules are not defined explicitly in contrast to major ones either. Rather, as noted, the CRA embraces the broad APA definition of “rule” that includes guidance: 804(3) of title 5 says “The term “rule” has the meaning given such term in section 551,” barring certain listed exceptions.

So, non-major rules may be thought of as defined implicitly in the Regulatory Right-to-Know Act by referring back to the Congressional Review Act’s definition of a “rule,” minus the major ones.

Significant Regulatory Action

The term “significant” did not appear with respect to classifying types of regulatory action in Reagan’s E.O. 12291, which featured major rules instead. Clinton’s follow-up 1993 E.O. 12866 did not use the term “major” rules, and reduced the body of rules requiring submission to OIRA review, as required in E.O. 12291, to “significant” ones.

Section 3(f) of E.O. 12866 defines “significant regulatory action” as “any regulatory action that is likely to result in a rule that may”:

A “significant” rule might be whatever OIRA says it is.

The largest regulations are often called “economically significant.” However, there is no law or executive order where the phrase actually appears.

1. Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
2. Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
3. Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
4. Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.⁵⁷

An important caveat here is that a “significant” rule might be whatever OIRA says it is. Just as the OMB director under E.O. 12291 could declare an action to be major, the OIRA administrator under E.O. 12866 can unilaterally deem a rule significant: “[T]hose [rules] not designated as significant will not be subject to review ... unless, within 10 working days of receipt of the list, the Administrator of OIRA notifies the agency that OIRA has determined that a planned regulation is a significant regulatory action.”

Reporting requirements apply to “each matter identified [by the agency] as, or determined by the Administrator of OIRA to be, a significant regulatory action.”⁵⁸ Conversely, an administrator may not deem a rule as significant, even if it is: “The Administrator of OIRA may waive review of any planned regulatory action designated by the agency as significant.”⁵⁹

OIRA asserts that it conducts its reviews “under Executive Orders 12866 and 13563” and so reviews the larger body of “significant” rules rather than solely “major.”⁶⁰ Out of over 3,000 rules each year, several hundred get tagged significant for purposes of E.O. 12866. Using the FederalRegister.gov website search function, one can see that those “Deemed Significant under E.O. 12866” amount to a few hundred annually.

Economically Significant

The largest regulations are often called “economically significant.” However, there is no law or executive order where the phrase actually appears.

In its annual *Report to Congress*, OMB incorporates “economically significant” rules into its in-house definition of “major” rule. In a footnote on page one, OMB says:

A regulatory action is considered “economically significant” under Executive Order 12866 § 3(f)(1) if it is likely to result in a rule that may have: “an annual effect on the

economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.⁶¹

In *The Regulatory Plan and the Unified Agenda of Federal Regulatory and Deregulatory Actions*, one finds an explicit definition of “economically significant” as one of the ways the Agenda classifies rules:

Economically Significant: As defined in Executive Order 12866, a rulemaking action that will have an annual effect on the economy of \$100 million or more or will adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. The definition of an “economically significant” rule is similar but not identical to the definition of a “major” rule under 5 U.S.C. 801 (Pub. L. 104-121).⁶²

The “economically significant” term has been a fixture in the Unified Agenda, which alone reports rules of that category. Yet the Agenda’s own definition of “economically significant,” like the OIRA *Report to Congress*, refers back to E.O. 12866. Similarly, OIRA’s

reginfo.gov page contains an FAQ that defines “significant” as seen above. However, it notes the following for economically significant rules:

- Q. What does it mean when a regulation is determined to be “economically significant?”
- A. These regulatory actions are a subset of those designated by OIRA as significant. A regulatory action is determined to be “economically significant” if OIRA determines that it is likely to have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. For all “economically significant” regulations, the Executive Order directs agencies to provide (among other things) a more detailed assessment of the likely benefits and costs of the regulatory action, including a quantification of those effects, as well as a similar analysis of potentially effective and reasonably feasible alternatives.⁶³

As one final example, OMB Circular A-4, which specifies practices and procedures for regulatory analysis, states: “Executive Order 12866 requires

Varieties of guidance have been defined by executive order, by OMB bulletin, and by agencies at their own discretion.

agencies to conduct a regulatory analysis for economically significant regulatory actions as defined by Section 3(f)(1).”⁶⁴

But interestingly, the term “economically significant” does not actually appear in E.O. 12866. Rather, E.O. 12866 provides the definition of “significant regulatory actions” detailed in the prior section.

E.O. 12866 Section 6 instructs agencies with a significant regulatory action to “provide ... a more detailed assessment of the likely benefits and costs of the regulatory action, including a quantification of those effects,” and refers back to the Section 3(f)(1) designation, “[h]ave an annual effect on the economy of \$100 million or more...”. Section 3(f) contains a list of four characteristics that brand a regulatory action a “significant regulatory action,” as itemized earlier here, and the \$100 million is the first of these. The other three features (Section 3(f)(2), (3) and (4)) may render a rule “significant,” or a “significant regulatory action”—but not “economically significant.”

If a rule is economically significant, it is also significant and major. This does not necessarily hold in reverse. Major and significant rules may or may not be economically significant.

**“Guidance Document,”
“Significant Guidance Document,”
“Economically Significant
Guidance Document,” “Major
Guidance”**

The complexity of rule classification is

exacerbated by the growing prevalence of guidance documents as a means of implementing policy. We noted above the early recognition of “interpretative guidance” in the APA. While “interpretative rule” is defined in statute, that is not yet the case for general “significant guidance.” Rather, varieties of guidance have been defined by executive order, by OMB bulletin, and by agencies at their own discretion.

Executive Orders 12291 and 12866 did not directly address guidance. Ultimately President George W. Bush’s 2007 E.O. 13422, amending Clinton’s E.O. 12866, defined “guidance document” as follows:

“Guidance document” means an agency statement of general applicability and future effect, other than a regulatory action, that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue.

A “significant guidance document” was defined in Bush’s E.O. 13422 as “a guidance document disseminated to regulated entities or the general public that, for purposes of this order, may reasonably be anticipated to”:

- Lead to an annual effect of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or

- safety, or State, local, or tribal governments or communities;
- Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights or obligations of recipients thereof; or
- Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order;⁶⁵

This description of “significant guidance document” matches E.O. 12866’s definition of “significant regulatory action” almost verbatim. Note that “economically significant guidance document” did not get defined in the Bush order.

Exclusions to the guidance definition were identified as well, such as guidance associated with formal rulemakings, non-procurement related military or foreign affairs, and those “limited to agency organization, management, or personnel matters.” Also notably exempted were “[a]ny other category of guidance documents exempted by the Administrator of OIRA.”⁶⁶

In then-OMB Director Rob Portman’s Good Guidance Practices memo, “guidance document”⁶⁷ is defined the

same as in E.O. 13422 (amending Clinton’s 12866): “The general definition of ‘significant guidance document’ in the final Bulletin adopts the definition in Executive Order 13422.”⁶⁸ The Good Guidance Practices memo further notes that “in recognition of the non-binding nature of guidance the words ‘may reasonably be anticipated to’ [instead of ‘likely to’] preface all four prongs of the ‘significant guidance document’ definition. This prefatory language makes clear that the impacts of guidance often will be more indirect and attenuated than binding legislative rules.”⁶⁹ This language would seem to make it easier to deem guidance “significant” were policy makers so inclined.

And, unlike “economically significant” regulatory action, which is not named and defined in statute or executive order, the term “economically significant guidance document” did receive an explicit definition in the Portman GGP memo:

The term “economically significant guidance document” means a significant guidance document that may reasonably be anticipated to lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy or a sector of the economy, except that economically significant guidance documents do not include guidance documents on Federal expenditures and receipts.⁷⁰

The Regulatory Accountability Act presents an opportunity to either consolidate and streamline the regulatory nomenclature or create still more confusion.

More recently, the “significant guidance document” definition was reinforced by OMB’s FAQ on Trump’s 13771 order as having the same meaning specified in OMB’s Final Bulletin for Agency Good Guidance Practices.⁷¹ Like the GGP bulletin, the Trump order indicates what is *not* included in the definition of significant guidance. This is noteworthy because some of the items omitted are precisely the kind of moves (such as adverse publicity⁷²) that government can use to “signal” and influence private sector behavior or “nudge” regulated parties. As the “Implementing Executive Order 13771 Memorandum” states, these exemptions are:

A significant guidance document does not include legal advisory opinions for internal Executive Branch use and not for release (such as Department of Justice Office of Legal Counsel opinions); briefs and other positions taken by agencies in investigations, pre-litigation, litigation, or other enforcement proceedings; speeches; editorials; media interviews; press materials; Congressional correspondence; guidance documents that pertain to a military or foreign affairs function of the United States (other than guidance on procurement or the import or export of non-defense articles and services); grant solicitations; warning letters; case or investigatory letters responding to complaints involving fact-

specific determinations; purely internal agency policies guidance documents that pertain to the use, operation or control of a government facility; internal guidance documents directed solely to other Federal agencies; and any other category of significant guidance documents exempted by an agency in consultation and concurrence with the OIRA Administrator.⁷³

The proposed Regulatory Accountability Act would inaugurate the term “major guidance” (as opposed to significant). In implementation, the RAA presents an opportunity to either consolidate and streamline the regulatory nomenclature or create still more confusion. The definition resembles the Act’s definition for major rules, with the difference that the major guidance section has “likely to lead to” regarding costs in its preamble, while the major rule section’s preamble has the phrase “likely to cause.”

“[M]ajor guidance” means guidance that the Administrator finds is likely to lead to—

(A) an annual effect on the economy of \$100,000,000 or more, adjusted once every 5 years to reflect increases in the Consumer Price Index for All Urban Consumers, as published by the Bureau of Labor Statistics of the Department of Labor;

(B) a major increase in costs or prices for consumers, individual industries, Federal, State, local, or

tribal government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, public health and safety, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets;

Recall that Portman’s prefatory language in the Good Guidance Practices (retained by the Trump executive order guidance) with respect to \$100 million in impacts is “may reasonably be anticipated to.” Whether that or RAA’s “likely to lead to” is less stringent could no doubt generate many a policy and law review article.

Additional Designations Used In Regulatory Disclosure

We have noted agencies’ preparation each year of a regulatory agenda, and GAO’s responsibilities with respect to maintaining a database of major rules. Both these publications document still more agency rule categories.

Unified Agenda Designations

E.O. 12866 specified:

As part of the Unified Regulatory Agenda, beginning in 1994, each agency shall prepare a Regulatory Plan ... of the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter.

While the schedule often slips, agencies still issue the Unified Agenda. As described above, the Agenda, in its categorization of rules by “priority” or significance, provides a definition of “economically significant.” It also invokes the CRA’s definition of major rule and notes whether or not a rule qualifies.⁷⁴

For each entry, the Agenda categorizes a rule by regulatory priority (“Priority—an indication of the significance of the regulation”). Along with economically significant, agencies assign each Agenda entry to one of the following less-than-coherent categories:

- **Other Significant:** A rulemaking that is not economically significant but is considered significant by the agency. This category includes rules that the agency anticipates to be reviewed under Executive Order 12866 or rules that are a priority of the agency head. These rules may or may not be included in the agency’s regulatory plan.
- **Substantive, Nonsignificant:** A rulemaking that has substantive impacts, but is neither significant, nor routine and frequent, nor informational/administrative/other.
- **Routine and Frequent:** A rulemaking that is a specific case of a multiple recurring application of a regulatory program in the Code of Federal Regulations and that does not alter the body of the regulation.

GAO submits reports to Congress on major rules under the Congressional Review Act, but is not required to do so on lesser ones.

- **Informational/Administrative/Other:** A rulemaking that is primarily informational or pertains to agency matters not central to accomplishing the agency’s regulatory mandate but that the agency places in the Unified Agenda to inform the public of the activity.⁷⁵

Government Accountability Office Designations

Along with the Agenda’s somewhat vague distinctions among sub-major rules, the Government Accountability Office has a similar but not exactly overlapping set of designations. GAO submits reports to Congress on major rules under the Congressional Review Act, but is not required to do so on lesser ones.⁷⁶ In the course of this reporting, GAO classifies rules several ways in its database based on information provided by agencies in fulfillment of the CRA.

The GAO’s questionnaire to agencies first asks for a classification of a rule type as a “Major Rule” or “Non-major Rule.” Then comes a query on “Priority of Regulation,” which presents a binary choice in which the agency must select one of the following:⁷⁷

“Economically Significant; or Significant; or Substantive, Nonsignificant”
Or,

| | | |
|------------|-------------------------------|--------------------|
| Rule Type: | All Major | Non-Major |
| Priority: | All Significant/Substantive | Routine/Info/Other |

“Routine and Frequent or Informational/Administrative/Other”⁷⁸

The items in the first category are self-contradictory. The second category mashes up allegedly routine rules affecting the private sector with those largely pertinent to agency operations.

When one searches GAO’s database of rules submitted to it in fulfillment of the CRA for rules by “Type” and “Priority,” the classifications are inconsistent with the ones used by the Unified Agenda (immediately above), but are still binary if one is not searching the whole (“All”):⁷⁹

A Venn diagram of these GAO and Agenda classifications would be nonsensical—if even possible. As Curtis Copeland of the Administrative Conference of the United States has noted, when compiling rules from the database, “The ‘significant/substantive’ category does not include the rules listed as ‘major’ rules even though all ‘major’ rules should be inherently considered ‘significant/substantive.’”⁸⁰

Conclusion

A significant but artificially created obstacle to addressing regulatory overreach is not knowing what to call regulatory actions and gauge their impact. As the administrative state grows, it becomes increasingly difficult

to discern the consequences of the various kinds of significant and major rules—as well as of the myriad seemingly minor rules. Worse, there are various loopholes for agencies to evade scrutiny, such as by classifying rules as coming in below the “significant” cost estimate threshold or deeming them to be “guidance” not subject to notice and comment. Agencies, quite simply, may declare rules that are in fact significant not to be such. And given the structure of the Administrative Procedure Act, even an action to get rid of a rule qualifies as a “rule.”

Fortunately, interest in regulatory review is longstanding and at times bipartisan. Examples include the creation of the Administrative Conference in 1964,⁸¹ concern about excess regulation from Presidents Richard Nixon, Gerald Ford, and Jimmy Carter, who signed the Regulatory Flexibility Act and Paperwork Reduction Act and was open to the idea of a regulatory budget⁸²—all the way up to the 1996 Congressional Review and today’s Senate version of the Congressional Accountability Act.

To streamline nomenclature, it may be helpful to break down regulations by categories such as paperwork, economic, social, safety, environmental, and to deal separately with those addressing agency internal operations.

Reporting on rules, especially on the major ones, could be refined by deciding

between the terms “significant” or “major” to create more uniformity, by greatly expanding disclosure of guidance, and by subjecting guidance to reforms that treat it like ordinary rules. The streamlined categories could be given greater clarity by assigning cost estimate tiers to rules—such as for example, those with estimated annual costs above \$50 million and below \$100 million, above \$100 million and below \$150 million, and so on.⁸³

Eliminating some of the guidance review exemptions found in the Office of Management and Budget’s Good Guidance Practices memo (and in Trump’s guidelines) would be helpful. Those exemptions are fatal, because any regulatory reform that reins in the number of new rules will lead to more guidance being issued instead. The nomenclature should also better capture initiatives that are deregulatory, since these are still considered “rules.”

The Administrative Procedure Act’s notice-and-comment requirement provides some limited scrutiny, but it is insufficient for reining in the proliferation of rules, let alone agency guidance proclamations that implement policy by bureaucratic fiat.⁸⁴ As the Table on page 10 shows, the Unified Agenda, OMB cost-benefit reporting to Congress, and GAO database reporting could use harmonization in any regulatory reform measures that gain traction.

Interest in regulatory review is longstanding and at times bipartisan.

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- 74 The Agenda notes whether or not a rule is “‘major’ under 5 U.S.C. 801 (Pub. L. 104-121) because it has resulted or is likely to result in an annual effect on the economy of \$100 million or more or meets other criteria specified in that Act. The Act provides that the Administrator of the Office of Information and Regulatory Affairs will make the final determination as to whether a rule is major.
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About the Author

Wayne Crews is Vice President for Policy at the Competitive Enterprise Institute (CEI). He is widely published and a contributor at Forbes.com. A frequent speaker, he has appeared at venues including the DVD Awards Showcase in Hollywood, European Commission–sponsored conferences, the National Academies, the Spanish Ministry of Justice, and the Future of Music Policy Summit. He has testified before Congress on various policy issues. Crews has been cited in dozens of law reviews and journals. His work spans regulatory reform, antitrust and competition policy, safety and environmental issues, and various information-age policy concerns.

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