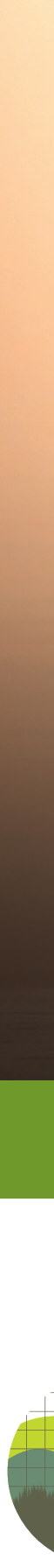
What We Lose When They "Save"

The Trump Administration's Misleading Claims About Deregulatory Cost Savings



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Politicians, pundits, and industry groups that oppose regulation often claim that erasing regulations yields large cost savings to companies and benefits to the economy. But those claims can be misleading because they frequently ignore the significant harms caused by rolling back regulations. In addition, the cost savings claims are often inflated in misleading ways. The Trump administration's claims on these issues, made most comprehensively in three "regulatory reform" reports issued under Executive Order 13,771, illustrate some of the most problematic ways the administration has been portraying deregulatory cost savings. This policy brief addresses and counters the administration's cost savings claims and demonstrates that the administration's claims should not be taken at face value.

By Ignoring Forgone Benefits, the Administration Has Provided a Misleading Account of Its Deregulatory Push

Touting Costs Savings while Ignoring Forgone Benefits Is Irrational

The Trump administration regularly boasts about the cost savings of rolling back regulations, focusing on industry profits without giving the forgone benefits of the rollback equal attention.[1] In rule after rule, the administration has cited cost savings as a reason for the rollback–without giving the forgone benefits on the other side of the equation equal consideration.[2]

The most recent example of the Trump administration's myopic focus on cost savings is the decision to roll back vehicle emissions standards, citing the costs of complying with the standards as justification for the rollback even though the administration's own cost-benefit analysis shows that societal harms will outweigh the cost savings of the rule.[3]

This trend is on particular display in the Trump administration's regulatory reform reports, released by the Office of Management and Budget (OMB), which have, for three years now, touted cost savings of the administration's deregulatory efforts while ignoring the lost benefits of these actions.[4] In total, there are more than 100 significant deregulatory actions[5] on the three lists. And the administration claimed cost savings of $13.5 billion from the listed deregulatory actions completed in fiscal year 2019, as well as $50.9 billion from all deregulatory actions completed in 2017-2019.[6] But all three lists were reported without any data on forgone benefits and the alleged cost savings should not be believed without a full accounting.

The Trump administration touts these cost savings numbers along with deregulation in general as part of an "economic plan" designed to boost prosperity and innovation.[7] For example, as part of a recent attempt to respond to the COVID-19 pandemic and the related economic crisis, the Trump administration called on agencies to roll back regulations "that may inhibit economic recovery, consistent with applicable law."[8] But research does not support the notion that regulation dampens prosperity and innovation.[9] In fact, the evidence supports the opposite conclusion. Regulation can create opportunities for innovation as well as promote an environment of health and wellbeing that allows people to thrive.[10]

Moreover, in instances where a regulation was promulgated to fix a serious societal problem, rolling back that regulation is not bound to boost the economy. Instead, it would hurt society. For example, consider a power plant that emits particulate matter pollution. Harms from particulate matter range from increased asthma rates to premature death, both

of which can affect the economy in real ways.[11] Yet a power plant's owner will not account for the societal harm caused by the pollution (a market failure known as a negative externality) unless a regulatory program requires the plant to internalize the cost.[12] For these reasons, touting the costs savings of deregulation by itself does not provide an accurate and full picture of the true impact of the action.[13] In fact, even the Trump administration has acknowledged on paper that "[s]ome forms of national regulation may have a positive effect on growth when they correct market failures"[14] and admitted that regulations "have promoted economic growth and otherwise had desirable economic effects."[15]

Some proponents argue that deregulation must happen in order to protect "individual liberty."[16] But tools to "measure the impact of regulatory and deregulatory actions as to their impact on freedom" do not exist yet.[17] And absent some attempt at measurement, the administration essentially treats "all regulations [as] equally intrusive."[18] That is not defensible. Even if there are liberty considerations, that does not mean liberty is a benefit of infinite magnitude that justifies any level of forgone health benefits. Moreover, there are liberty interests in regulation, as people have interests in freedom from involuntary exposure to environmental contaminants.

To be sure, the Obama administration also encouraged agencies to review and potentially repeal "outmoded, ineffective, insufficient, or excessively burdensome" regulations,[19] but in this instance, the administration made sure to instruct agencies to look for regulations to cut, while also "protecting public health, welfare, safety, and our environment."[20] In sum, whether the Trump administration seeks to improve the economy through deregulation or protect liberty interests, ignoring countervailing considerations is not rational.

A Deeper Look at the Trump Administration's Cost Savings Claims Reveals Major Weaknesses

The Trump administration ignores the costs of rolling back regulations at its peril. Agencies have traditionally prevailed in most legal challenges to their actions[21] but, during the Trump administration, agencies have lost more than 90% of the time.[22] In these cases, ignoring both the forgone benefits and the harms of a rule has been a key failing. For example, the U.S. Court of Appeals for the D.C. Circuit recently struck down a Health and Human Services rule after finding that the agency had failed to account for the loss in Medicaid coverage that would occur under the rule.[23] Previously, the same court had struck down the Environmental Protection Agency's delay of a rule that was meant to improve safety at chemical plants, in part because the agency had failed to adequately address the forgone benefits of the suspension.[24] Another court enjoined a Department of Homeland Security rule that expanded fast-track deportations after finding that the agency had arbitrarily focused only on the rule's upsides while ignoring the "potential negative impacts" that the rule would have on the "people and communities the policy would affect."[25] As that court explained, "an administrative agency that plows ahead and announces a new rule, without taking the reasonably foreseeable potential negative impacts of the policy determination into account . . . might as well have picked its policy out of a hat."[26] The law does not allow agencies to take such one-sided actions.

Despite these losses, the administration continues to tout the cost savings of its deregulatory actions while ignoring the forgone benefits in the administration's regulatory reform reports. To address this imbalance, we set out to analyze the forgone benefits of the deregulatory rules listed in the regulatory reform reports. This Part explains what we found when we combed through the rules listed in the reports and then provides a forgone benefits estimate based on the limited numbers of rules that have available benefits estimates.

Analyzing Aggregate Forgone Benefits

To calculate its aggregate cost savings numbers, the administration compiles a list of rules from each agency and then takes the individual cost savings numbers in each rule and converts them to a common time horizon—an infinite time horizon with a seven-percent discount rate—so that the rules can be summed to create the aggregate number.[27] The same methodology could be used to calculate an aggregate forgone benefits total. But the administration does not provide any comparable estimates. And, as our analysis of the limited information available for the rules on the lists for fiscal years 2017 through 2019 shows, any such calculation will have to be incomplete for three reasons.

First, very few of the rules on the lists have any estimate of quantified forgone benefits.[28] In fact, out of more than a hundred significant deregulatory rules, agencies only provided quantified forgone benefits estimates in two of the rules. And even when a rule rolls back a prior rule that did have a benefits estimate associated with it, that benefits estimate often cannot be easily translated into an estimate of forgone benefits because the rollbacks often are not full rollbacks.[29] In cases where the deregulatory rules were full repeals or suspensions, many of them were vacated by courts and thus it would not be accurate to say that those rules have forgone benefits. For example, the regulatory reform reports include a rule on examinations of Working Places in Metal and Nonmetal Mines, vacated in 2019,[30] a rule delaying civil penalties for violations of fuel economy standards, vacated in 2018,[31] a rule delaying formaldehyde emissions standards, which was vacated in 2018,[32] and a delay of a rule meant to cut waste at oil and gas mining facilities, enjoined in 2018.[33]

Second, in cases where the agencies did provide a forgone benefits estimate, some agencies have underestimated those benefits. For example, in replacing a regulation that would have cut greenhouse gas emissions at existing power plants, with a much weaker regulation, EPA reports that forgone benefits are zero based on the assumption that cleaner states that have already made significant cuts would absorb the shortfalls of dirtier states in an interstate trading scheme allowed under the rule.[34] The assumption is that cleaner states would sell their credits to dirtier states, which could use the credits to comply with the regulation without making any actual cuts. But greenhouse gases are a global pollutant, which means that emissions in Louisiana have the same impact on Massachusetts as emissions in Massachusetts. And there is no evidence that states that have made significant cuts already would sell their credits to other states to allow them to continue polluting. On the contrary, there are even some states with stringent carbon-emission standards that expressly prohibit emission trading with states lacking such standards.[35] The assumption that the Clean Power Plan will have no forgone benefits is thus unrealistic.

Third, any aggregate forgone benefits number leaves out what could be significant but nonquantified forgone benefits.[36] Nonquantified benefits can include a range of environmental and public health effects, such as reducing the risk of wildlife exposure to pollutants[37] or human health benefits from reductions in exposure to hazardous air pollutants.[38] A number of environmental regulations are premised on the importance of nonquantified benefits that could easily swamp any cost-savings from a rollback. For example, a rule meant to improve safety at offshore oil wells, weakened by the Trump administration,[39] promised benefits from reducing oil spills and injuries to workers.[40] Though the agency found that the benefits were difficult to quantify, the agency did use a break-even analysis[41] to conclude that the "societal benefits of the final rule justify the societal costs."[42] Similarly, the Chemical Disaster Rule,[43] which was also weakened significantly by the Trump administration,[44] had a number of nonquantified benefits including benefits from decreasing the number and severity of chemical disasters as well as avoiding "lost productivity, the costs of emergency response, transaction costs, property value impacts . . . and environmental impacts" from additional accidents.[45] As another example, the Waste Prevention Rule, repealed by the Trump administration,[46] was meant to conserve natural gas, reduce greenhouse gas emissions, and provide significant nonquantified benefits in the form of reduced emissions of volatile organic compounds

and hazardous air pollutants.[47] Rolling back those regulations now causes many nonquantified harms, like adverse public health effects due to increased air pollution or degradation of wetland ecosystems, which should not be ignored in any accounting of the administration's aggregate cost savings.

In sum, given all of these limitations, any aggregate estimate of forgone benefits is necessarily incomplete.

Calculating Forgone Benefits

Because forgone benefits estimates were missing from most of the rules listed on the regulatory reform reports, there were very few rules that could be used to calculate an aggregate forgone benefits estimate. Despite these challenges, we were able to analyze eight deregulatory rules using the benefits values from the original rules. This allowed us to estimate the aggregate forgone benefits of rules listed on the regulatory reform reports.

For our analysis, we selected only those rules that had sufficient data to support a defensible estimate of forgone benefits, because either the deregulatory rule or the original rule (being rolled back) contained such estimates. We did not include any forgone benefits from deregulatory rules that had been vacated by the courts.[48] All told, after we applied these criteria, there were only eight rules with available forgone benefits estimates.

For several rules we made certain assumptions about how to calculate the forgone benefits. For short-term deregulatory rules, such as suspensions, we calculated the forgone benefits from only that time period. In addition, for some rules we relied on the benefits estimates from the original rules because of concerns about the forgone benefits estimates in the deregulatory rule. For example, in the repeal of the Waste Prevention Rule, the agency changed the metric it used to estimate the damages from increases in greenhouse gas emissions caused by the rule, but the new metric drastically and irrationally undercounts those damages[49] and, as such, we used the benefits estimate reported in the original rule.

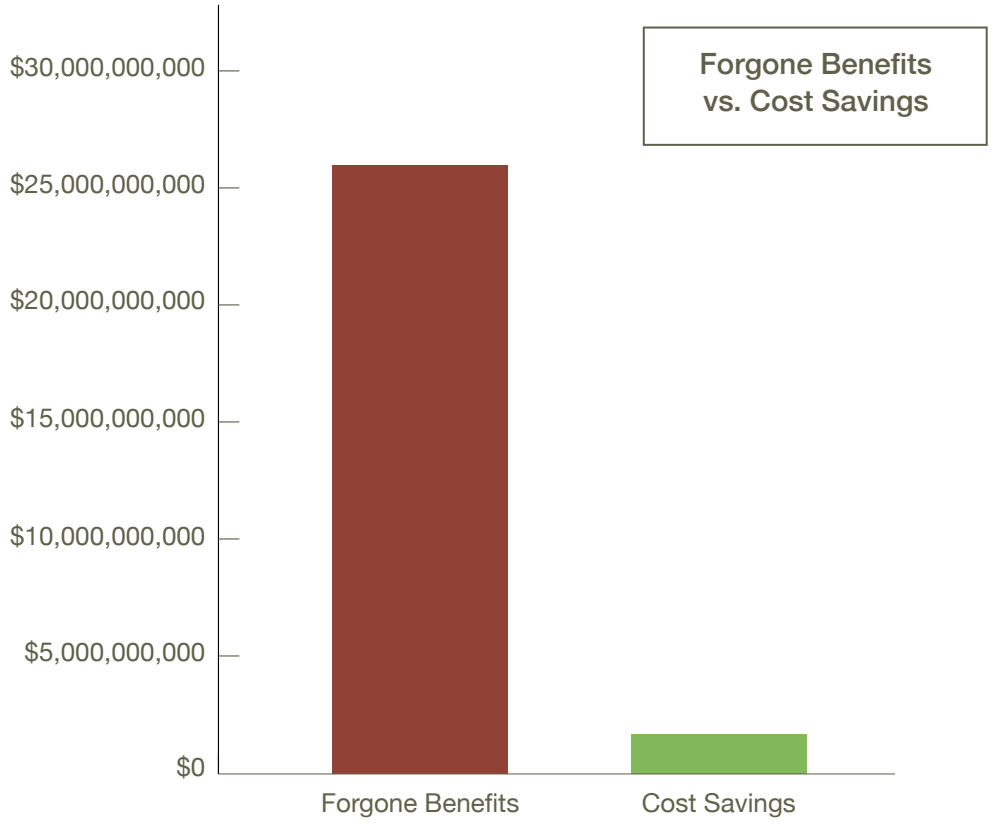
After identifying the eight rules, we applied the administration's own methodology for calculating an aggregate cost savings number[50] and found that combining forgone benefits estimates for those rules leads to an estimate of almost $26 billion. These calculations are shown in the table below. In comparison, as shown below, the aggregate cost savings for these rules is, at the high end, just over $1.75 billion. This total is far outweighed by the forgone benefits. Even if we use the forgone benefits estimates included in the two deregulatory actions that report them, these two rules still account for forgone benefits that are more than the administration's claimed cost savings in the eight rules: about $2 billion in forgone benefits.[51]

> Using the administration's own methodology, just eight rules forgo benefits of almost $26 billion.

Given these estimates, it is quite possible that the forgone benefits of all the rules on the three lists would greatly outweigh the administration's aggregate cost savings estimates.

Forgone Benefits and Cost Savings of Deregulatory Actions (FY17-19)

Rule	Deregulatory Action	Forgone benefits	Cost savings
Definition of the Term "Fiduciary"	Assuming a 14-month delay[52]	$8,291,286,400[53]	$329,109,368[54]
Food Labeling: Revision of the Nutrition and Supplement Facts Labels	18-month delay[55]	$7,336,448,598[56]	$1,000,000[57]
Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements	Repeal[58]	$5,757,142,857[59]	$1,136,986,057[60]
Adopting Requirements in Emission Guidelines for Municipal Solid Waste Landfills	27-month delay[61]	$2,601,869,159[62]	$202,425,421[63]
Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption	2-year delay[64]	$1,789,485,981[65]	$9,672,897[66]
Limited Extension of Select Compliance Dates for Occupational Exposure to Beryllium in General Industry	9-month delay[67]	$88,615,781[68]	$573,396[69]
Postponement of Certain Compliance Dates for the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category	2-year delay[70]	$65,001,869[71]	$71,192,523[72]
Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Amendments	Partial repeal[73]	$695,589[74]	$442,857[75]
Total		$25,930,546,234	$1,751,402,519



Administrations of both parties have long recognized the importance of assessing an action's benefits to society, not merely the compliance costs to the regulated industry. White House guidance that has been reaffirmed by multiple administrations of both parties[76] is the gold standard on this issue. Pursuant to that guidance, agencies must look at regulations *from the perspective of society* and "propose or adopt" a regulation only when the "benefits … justify its costs."[77] On paper, even the Trump administration has endorsed this guidance, calling it the "primary governing" executive order for regulatory planning.[78] And both of the Office of Information and Regulatory Affairs administrators under Trump have publicly claimed to support the principles of Executive Order 12,866.[79] Yet Executive Order 13,771 directs agencies to focus on cost savings and ignores the need to assess the harms that are being caused. In this way, the administration's cost savings claims have provided a deeply misleading account of its deregulatory efforts.[80]

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The Administration's Cost Savings Estimates Mislead the Public

Executive Order 13,771's exclusive focus on cost savings deprives the public of important information about how deregulation affects society. But OMB has taken further steps to mislead the public in the cost savings numbers themselves by failing to provide a transparent accounting of its estimates. For example, while the regulatory reform reports list the rules that are included in the total for each agency and list the agency total, they do not provide the cost savings estimate for each rule. For that reason, it is impossible to know how the administration came up with its totals.[81]

In addition, there are four different ways that the administration could be inflating its cost-savings estimates. Without a transparent accounting, it is just not possible to verify the administration's cost-savings claims.

First, OMB could be inflating its cost-savings number by counting benefits as cost savings. For example, the Department of Agriculture's rule on labeling genetically modified organisms is included in the 2019 regulatory reform list; however, the cost savings are calculated based on the rule's net benefits, on the grounds that the rule saves money by preempting costly state-level regulations.[82] But—as the Department of Agriculture cannot know what states might have put laws in place without this rule—that assumption is based on speculation rather than calculations of the rule's actual projected benefits.[83] The rule creates a *new* requirement and is therefore regulatory. This is not the only example of an action that creates new requirements being categorized as deregulatory in one of the regulatory reform reports. A rule from the Drug Enforcement Administration that expands options for opioid treatments[84] is designed to reduce the societal cost of opioid addiction treatment.[85] This action builds on previous regulations and provides benefits to society, even though it is listed as a deregulatory action by OMB. A similar example is a rule issued by the Animal and Plant Health Inspection Service changing performance standards for importation and interstate transport of fruits and vegetables,[86] which interprets "net welfare gains" as cost savings.[87] OMB's lack of transparency on these rules makes its cost savings reports misleading.

Second, by including vacated rules on the list, OMB appears to be taking credit for cost savings for deregulatory actions that were vacated after court challenges.[88] If OMB included cost savings from vacated rules in the total, that would be wholly misleading.

Third, OMB may be including cost savings from rules with effects that are all or mostly transfers. Transfers are payments from one group to another and they should not be counted as either a cost or a benefit.[89] For example, the Borrower Defense Rule provides expedited payments to students who borrowed money to go to a fraudulent for-profit school. But federal government payments to students are a transfer, not a benefit, and that is how the agency originally characterized the impact of the rule. In other words, payments to students are offset by losses born by the federal government and they do not affect the total resources available to society.[90] The Borrower Defense Rule rollback, which OMB lists in its regulatory reform reports, lists cost savings of $4.7 million, but transfers "among borrowers, institutions, and the Federal Government" of $550 million.[91] Similarly, the repeal of the Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform Rule is included in the regulatory reform report for fiscal year 2017,[92] but it includes primarily transfers.[93] It is unclear whether those transfers were included in the regulatory reform report aggregate cost savings numbers. But if they were, that would be inappropriate because those government savings are entirely offset by corresponding losses.

Fourth, OMB could be inflating the numbers in other ways. If a rule has only a fifteen-year estimate of cost savings, for example, the agency must convert that into a perpetual time horizon per OMB's 13,771 accounting methodology[94] and make an assumption about the costs after that fifteenth year. Depending on the assumptions, the cost savings could be higher or lower. For example, if OMB assumes that the fifteen-year cost trend repeats in the long-term, the estimate would be much higher than if OMB assumes that costs remain at the level they stood at in the fifteenth year alone.[95] The same assumptions on future cost savings must be made for a number of rules for which agencies' regulatory impact analyses only give cost savings over a fixed time frame.[96]

In sum, because of the lack of clarity and transparency on this front, OMB's cost savings claims are not credible.[97]

Conclusion

Executive guidance requires agencies to promulgate regulations that are welfare improving. Given the potentially significant forgone benefits at issue with a large-scale deregulatory push, selectively showcasing only a cost savings number fails to address the other side of the equation and so misleads the public about the true effect of deregulatory actions. Any administration that takes its obligations to the public seriously cannot focus solely on cost savings to industry, but must instead provide an accurate representation of how the rules will affect the public. Absent a transparent accounting of the cost savings numbers and an accounting of the forgone benefits, the Trump administration's claims under Executive Order 13,771 are misleading.

Endnotes

[1] *See, e.g.,* White House, President Trump: Cutting Red Tape for American Businesses (Feb. 14, 2017), *available at* https://perma.cc/2RSR-GBXG (trumpeting a decision to remove compliance costs and paperwork burdens without mentioning the forgone benefits).

[2] *See* National Highway Traffic Safety Admin. ("NHTSA"), Civil Penalties, Final Rule, 84 Fed. Reg. 36,007 (July 26, 2019) (reversing penalties increase while denying any substantial harms); *see also* Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200 (Feb. 6, 2018) (ignoring the harms of suspension of the Clean Water Rule); NHTSA, Civil Penalties, Delay of Effective Date, 82 Fed. Reg. 32,139 (July 12, 2017) (same for suspension of penalties provision); Bureau of Land Mgmt., Postponement of Certain Compliance Dates, 82 Fed. Reg. 27,430 (June 15, 2017) (same for suspension of "Waste Prevention Rule"); EPA, 82 Fed. Reg. 27,133 (June 14, 2017) (claiming that forgone benefits of suspension of Chemical Disaster Rule were speculative); EPA, Postponement of Certain Compliance Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power Generation Point Source Category, 82 Fed. Reg. 19,005 (Apr. 25, 2017) (ignoring harms in suspension of wastewater limits).

[3] *See* Policy Integrity, Key Economic Errors in the Clean Car Standards Rollback (April 1, 2020) (detailing problems in the agencies' justification), https://policyintegrity.org/files/media/Vehicles_Emissions_Rollback_-_Key_Economic_Errors.pdf.

[4] Regulatory Reform under Executive Order 13771: Final Accounting for Fiscal Year 2019, https://perma.cc/TBX8-SPCZ; Regulatory Reform under Executive Order 13771: Final Accounting for Fiscal Year 2018, https://perma.cc/VN5W-396S; Regulatory Reform: Completed Actions Fiscal Year 2017, https://perma.cc/M99U-F3SM; *see also* Regulatory Reform Reports from Previous Fiscal Years, https://perma.cc/HT85-SPT4.

[5] This tally includes all the rules marked as "significant" in the 2018 and 2019 regulatory reform reports. The 2017 list does not identify the significant rules, but each individual rule is marked as significant or not and the significant ones are the ones that are included in the tally. *See also* Executive Order 12,866 § 3(f) (defining significant).

[6] Regulatory Reform under Executive Order 13771: Final Accounting for Fiscal Year 2019, https://perma.cc/TBX8-SPCZ. The fiscal year began on October 1, 2018, and ran through September 30, 2019.

[7] *See* Keith B. Belton & John D. Graham, *Trump's Deregulation Record: Is It Working?*, 71 Admin. L. Rev. 803, 815 (2019), https://perma.cc/B4ZM-9MR6; *See also* Council of Economic Advisers, How Deregulation Can Increase Economic Growth (October 2, 2017), https://perma.cc/AL6A-VJ8K.

[8] Executive Order on Regulatory Relief to Support Economic Recovery § 1 (May 19, 2020), https://www.whitehouse.gov/presidential-actions/executive-order-regulatory-relief-support-economic-recovery/.

[9] Nathan Goldschlag & Alex Tabarrok, *Is Regulation to Blame for the Decline in American Entrepreneurship?*, 33 Econ. Pol'y 5 (2018) (finding "no significant relationship between federal regulation and changing economic dynamism"); *see also* Yafit Lev-Aretz & Katherine J. Strandburg, *Privacy Regulation and Innovation Policy*, 22 Yale J. of L. and Tech. 256, 259-69, n.6 (2020) (collecting articles for and against this point); Jodi L. Short, *The Trouble With Counting: Cutting Through the Rhetoric of Red Tape Cutting*, 103 Minn. L. Rev. 93, 147-48 (2018) (collecting research).

[10] John Conyers, Jr., Henry Johnson, Jr. & David N. Cicilline, *The Dangers of Legislating Based on Mythology: The Serious Risks Presented by the Anti-Regulatory Agenda of the 115th Congress and the Trump Administration*, 54 Harv. J. on Legis. 365, 378-83 (2017); *see also* Aaron L. Nielson, *Sticky Regulations*, 85 U. Chi. L. Rev. 85, 116 (2018) (explaining how the rules governing regulatory change make such change more difficult and thus promote regulatory certainty, innovation, and investment).

[11] Those in poor health have higher medical expenditures and they are less able to work–both factors that could hurt the economy. *See, e.g.,* James M. Poterba, Steven F. Venti & David A. Wise, *The Asset Cost of Poor Health* at 172-184, The Journal of the Economics of Ageing (2017), https://doi.org/10.1016/j.jeoa.2017.02.001 (finding that the "asset cost of poor health may be quite large").

[12] *See* Paul Krugman & Robin Wells, Microeconomics 437 (2d ed. 2009).

[13] Caroline Cecot & Michael Livermore, *The One-In, Two-Out Executive Order Is a Zero*, 166 U. Pa. L. Rev. Online 1, 5 (2017) ("The cost-benefit principle would ensure that the benefits that accrue to the winners are greater than the costs that fall on the losers so that society, in the aggregate, is better off in a world with this regulation than in a world without this regulation.").

[14] OMB, 2017 *Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act* at 46 (2017), *available at* https://perma.cc/K72M-DUSK.

[15] *Id.* at 49.

[16] *See* Belton & Graham, *supra* note 7, at 815-817 (quoting Donald McGahn's claim that "[t]he ever-growing, unaccountable administrative state is a direct threat to individual liberty."); *see also* Diane Katz, *"Deregulation Day" Spotlights Big Changes Trump Is Bringing to Washington*, Heritage Foundation (Oct. 2, 2017) ("Regulation acts as a stealth tax on the American people and the U.S. economy, and exacts an incalculable toll

on individual liberty."), https://perma.cc/5L36-9A7X; OMB, *2018, 2019 and 2020 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act* at 9 (citing dignity as an important non-monetized cost of regulation to consider), *available at* https://perma.cc/HK6D-SDRD.

[17] Belton & Graham, *supra* note 7, at 875.

[18] *Id.*

[19] Executive Order No. 13,563 § 6 (Jan. 18, 2011), https://perma.cc/7MRK-862H.

[20] Executive Order No. 13,610 § 3 (May 10, 2012), https://perma.cc/EX7P-BUZ7.

[21] David Zaring, *Reasonable Agencies*, 96 Va. L. Rev. 135, 170 (2010).

[22] *See* Institute for Policy Integrity, *Roundup: Trump-Era Agency Policy in the Courts*, https://policyintegrity.org/deregulation-roundup. For the tracker as of May 18, 2020, see https://perma.cc/ U2A6-7SUU.

[23] *Gresham v. Azar*, 950 F.3d 93, 102 (D.C. Cir. 2020) (holding that the rule was arbitrary and capricious for failure to account for the loss in coverage that would occur under the rule).

[24] *Air Alliance Houston v. Envtl. Protection Agency*, 906 F.3d 1049, 1067; *see also Cal. v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1122 (N.D. Cal. 2017) (holding that agency's failure to consider forgone benefits in suspension rule was arbitrary). *See also* Institute for Policy Integrity, Roundup: Trump-Era Agency Policy in the Courts, https://policyintegrity.org/trump-court-roundup (tracking litigation outcomes for the Trump administration).

[25] *Make the Rd. N.Y. v. McAleenan*, 405 F. Supp. 3d 1, 56-60 (D.D.C. 2019), appeal filed (D.C. Cir. No. 19-5298).

[26] *Id.* at 60.

[27] OMB, Accounting Methods under Executive Order 13771, https://perma.cc/8X2J-G6BT (hereinafter "OMB Accounting Methods").

[28] *See* Stuart Shapiro, *Making Sense of the Trump Administration's Regulatory Numbers*, Regulatory Review (Jan. 14, 2020), https://www.theregreview.org/2020/01/14/shapiro-making-sense-trump-administration-regulatory-numbers/.

[29] *See, e.g.,* Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residues From Electric Utilities: Amendments to the National Minimum Criteria, 83 Fed. Reg. 36,435 (July 30, 2018) (partially rolling back a rule governing disposal of coal ash).

[30] *United Steel, et al. v. MSHA, et al.*, 925 F.3d 1279 (D.C. Cir. 2019).

[31] *Natural Resources Defense Council v. National Highway Traffic Safety Admin.* 894 F.3d 95 (2d Cir. 2018).

[32] *Sierra Club v. Pruitt*, 293 F. Supp. 3d 1050 (N.D. Cal. 2018).

[33] *California v. U.S. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054 (N.D. Cal. 2018).

[34] EPA, Regulatory Impact Analysis for the Repeal of the Clean Power Plan, and the Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units at 2-19-28 (June 2019), https://www.epa.gov/stationary-sources-air-pollution/regulatory-impact-analysis-repeal-clean-power-plan-and-emission.

[35] California, which passed a series of measures to reduce its carbon footprint in order to help curb the "serious threat" from climate change and "encourage[e] other states" to undertake similar reductions, Cal. Health & Safety Code § 38501, permits linkage only with cap-and-trade programs with requirements "equivalent to or stricter than" its own. Cal. Gov't Code § 12894(f)(1). Washington also requires any linked cap-and-trade program to be "compatibl[e]" with its own "requirements," which call for the state's electricity supply to be carbon-neutral by 2030. Wash. Rev. Code § 19.405.130(1)(b), § 19.405.010(2). Colorado law provides similar restrictions. C.R.S. 25-7-105(1)(e)(V).

[36] Richard L. Revesz, *Quantifying Environmental Benefits*, 102 Cal. L. Rev. 1423, 1426 (2014) (describing nonquantified benefits and explaining that they "are simply benefits that have not yet been quantified").

[37] *See* EPA, Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category 80 Fed. Reg. 67837, 67,874 (Nov. 30, 2015).

[38] *See* EPA, Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills, 81 Fed. Reg. 59,275, 59,280. (Aug. 29, 2016).

[39] Blowout Preventer Systems and Well Control Revisions, 84 Fed. Reg. 21,908, 21,918 (May 15, 2019).

[40] 81 Fed. Reg. 61,834, 61,847, 61,906-8 (Sept. 7, 2016).

[41] Final Economic Analysis Oil and Gas and Sulphur Operations in the Outer Continental Shelf at 22-29 (Aug. 2016) (conducting a break-even analysis), *available at* https://www.regulations.gov/document?D=BSEE-2012-0005-0073; *See also* Revesz, *supra* note 36, at 1436.

[42] 81 Fed. Reg. at 61,906-8.

[43] Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, 82 Fed. Reg. 4594. 4684 (Jan. 13, 2017).

[44] *See* 84 Fed. Reg. 69,834 (Dec. 19, 2019). Previously, the Trump administration delayed the rule, but that delay was vacated. *Air Alliance Houston v. Envtl. Protection Agency*, 906 F.3d 1049, 1067 (D.C. Cir. 2018).

[45] *See* 82 Fed. Reg. at 4684.

[46] 83 Fed. Reg. 49,184 (Sept. 28, 2018).

[47] Regulatory Impact Analysis for the Waste Prevention Rule at 5-6 (Nov. 10, 2016), *available at* https://www.regulations.gov/document?D=BLM-2016-0001-9127. Similarly, the Trump administration repealed the 2015 Hydraulic Fracturing Rule, 82 Fed. Reg. 61,924 (Dec. 29, 2017), which had promised nonquantified benefits in the form of reduced public health and environmental harms, reduced remediation costs, increased assurance of environmentally safe operations, air emission benefits, worker safety protections, increased public awareness and other informational benefits, reduced economic impacts, and various cost savings to industry. BLM, Regulatory Impact Analysis for Hydraulic Fracturing Rule 2, 77-80 (2015); 80 Fed. Reg. 16,128, 16,163, 16,203 (Mar. 26, 2015).

[48] *See supra* notes 30-33 and accompanying text.

[49] *See, e.g.,* Br. of the Institute for Policy Integrity as Amicus Curiae at 10-19, *California v. Zinke*, No. 18-5712 (N.D. Cal. Jun 21, 2019), https://policyintegrity.org/documents/Policy_Integrity_Amicus_Brief_18-CV-05712.pdf.

[50] OMB Accounting Methods *supra* note 27.

[51] Only two deregulatory actions included estimates of forgone benefits: Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements 83 Fed. Reg. 49,184 (Sept. 28, 2018); and Postponement of Certain Compliance Dates for the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg 43,494 (Sept. 18, 2017).

[52] 82 Fed. Reg. 16,902 (April 7, 2017). Before the agency's delay ended, the U.S. Court of Appeals for the Fifth Circuit vacated the Fiduciary Rule, *Chamber of Commerce of United States of America v. United States Department of Labor*, 885 F.3d 360 (5th Cir. 2018), thus we have assumed that the impact of the delay ended then.

[53] Calculated based on the benefits in the original rule, 81 Fed. Reg. 20,945, 20,951 (Apr. 8, 2016).

[54] Calculated based on cost savings in deregulatory rule, 82 Fed. Reg, 56,545, 56,557 (Nov. 29, 2017) (providing an estimate of $2 billion for the 10-year value of an 18-month delay, at the 7% discount rate).

[55] 83 Fed. Reg. 19,619 (May 4, 2018).

[56] Calculated based on annualized benefits reported in the original rule, 81 Fed. Reg. 33,741, 33,745 (Tbl. 1) (Jul. 26, 2016).

[57] Calculated based on the cost savings reported in the deregulatory rule, 83 Fed. Reg. 19,619, 19,620 (Tbl. 1) (May 4, 2018).

[58] 83 Fed. Reg. 49,184 (Sept. 28, 2018).

[59] Calculated based on the high end estimate of benefits reported in the original rule, 81 Fed. Reg. 83,008, 83,069 (Nov. 18, 2016) ("The BLM estimates that this rule would result in monetized benefits of $209-403 million per year (calculating the monetized emissions reductions using model averages of the social cost of methane with a 3 percent discount rate.").

[60] Calculated based on the cost savings reported in the deregulatory action and assuming continuous annualized cost savings in perpetuity of $25 million. *See* Regulatory Impact Analysis for the Final Rule to Rescind or Revise Certain Requirements of the 2016 Waste Prevention Rule, 49 (tbl 4.2a showing the net present value of 10-year cost savings of $559 million at a 7-percent discount rate, for 2019-2028), *available at* https://www.regulations.gov/document?D=BLM-2018-0001-223607.

[61] 84 Fed. Reg. 44,547, 44,549 (Aug. 26, 2019) (explaining the new deadline is August 29, 2019 instead of May 29, 2017).

[62] Calculated based on the benefits from cutting methane emissions reported in the original rule, 81 Fed. Reg. 59,276, 59,280 (Aug. 29, 2016) ("The EPA estimates that the final rule's estimated methane emission reductions and secondary CO2 emission reductions in the year 2025 would yield global monetized climate benefits of $200 million to approximately $1.2 billion, depending on the discount rate. Using the average social cost of methane (SC-CH4) and the average social cost of CO2 (SC-CO2), each at a 3-percent discount rate, results in an estimate of about $440 million in 2025 (2012$)").

[63] Calculated based on the annual costs in the original rule, 81 Fed. Reg. 59,276, 59,279.

[64] 84 Fed. Reg. 9706, 9,708 (March 18, 2019).

[65] Calculated based on the benefits in the original rule, 80 Fed. Reg. 74353 (Nov. 27, 2015).

[66] Calculated based on annualized cost savings of the deregulatory rule, 84 Fed. Reg. 9,706, 9,713 (Tbl. 6) (Mar. 18, 2019).

[67] 83 Fed. Reg. 39,351 (Aug. 9, 2018) (extending compliance date of certain provisions until December 12, 2018 from March 12, 2018).

[68] Calculated based on the benefits in the original rule, 80 Fed. Reg. 47,565, 47,568 (Aug. 7, 2015), and using the logic that the agency used to calculate cost savings in the deregulatory rule, *see* 83 Fed. Reg. at 39,358.

[69] Calculated based on the cost savings reported in the deregulatory rule, 83 Fed. Reg. 39,351, 39,359 (Aug. 9, 2018) (using the methodology of tbl. 2).

[70] 82 Fed. Reg. 43,494, 43,498 (Sept. 18, 2017).

[71] Calculated based on forgone benefits reported in the deregulatory rule, 82 Fed. Reg 43,494, 43,498 (Sept. 18, 2017).

[72] Calculated based on cost savings reported in the deregulatory rule, *id* (showing annualized cost savings of $36.8 million).

[73] 83 Fed. Reg. 10,628 (March 12, 2018).

[74] Calculated using the Interagency Working Group's Social Cost of Carbon, *see* https://costofcarbon.org/faq, and based on the forgone emissions reductions of 772 metric tons of carbon dioxide equivalent reported in the deregulatory rule. 83 Fed. Reg. at 10,636-37 (Tbl. 3).

[75] Calculated based on the deregulatory rule, 83 Fed. Reg. at 10,636 (Tbl. 2 showing $31,000 in cost savings without product recovery at a 7-percent discount rate).

[76] *See, e.g.,* Executive Order 13,563 § 1(b), "Improving Regulation and Regulatory Review," ("This order is supplemental to and reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in Executive Order 12866 of September 30, 1993."); Executive Order 13,771 § 3, "Reducing Regulation and Controlling Regulatory Costs" (reiterating requirements of 12,866).

[77] Executive Order 12,866, § 1(b)(6) (1993), https://perma.cc/B69M-AFB2.

[78] Memo from Dominic J. Mancini, *Guidance Implementing Executive Order 13771, Titled "Reducing Regulation and Controlling Regulatory Costs"* at 2 (April 5, 2017), https://perma.cc/X2K9-L3QM.

[79] Testimony of Neomi Rao Administrator of the Office of Information and Regulatory Affairs Before the Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Regulatory Affairs and Federal Management (April 12, 2018) ("Importantly, all deregulatory actions have to meet the same standards as regulatory actions, which means that agencies must demonstrate that a proposed deregulatory action produces more benefits than costs."), https://perma.cc/2MS8-DTE8; Jory Heckman, *OIRA looking beyond 'low-hanging fruit' under 2-for-1 regulation rollback*, Federal News Network (Dec. 4, 2019), https://perma.cc/V653-48JK.

[80] Even those who support the goals of deregulation see the risks of ignoring forgone benefits. *See* Belton & Graham, *supra* note 7, at 876 ("Failure of agencies to analyze foregone benefits will undermine public confidence in regulatory analysis and put deregulatory actions at significant risk of judicial and legislative reversal.").

[81] *See* Bridget C.E. Dooling, et. al., *Accounting for Regulatory Reform under Executive Order 13771: Explainer and Recommendations* at 19, 24 (Nov. 2019), *available at* https://www.brookings.edu/research/accounting-for-regulatory-reform-under-executive-order-13771/ (calling on the administration to "disclose the cost or cost savings estimates for each regulatory and deregulatory action").

[82] National Bioengineered Food Disclosure Standard, 83 Fed. Reg. 65814, 65,869 (Dec. 21, 2018) ("…we use the midpoint of the estimated net benefits as an approximation of the primary estimate of annualized savings in perpetuity. This results in an estimated annual savings of $77 million using a discount rate of seven percent ($45 million using a discount rate of three percent).").

[83] *Id.* ("We estimate the size of these benefits by focusing on Vermont's BE labeling law because that law had been signed into law before the NBFDS was passed. The annualized net benefit from replacing the Vermont BE labeling law would be between $40 million and $49 million at a three percent discount rate and between $70 million and $84 million at a seven percent discount rate. This is our best estimate of these potential benefits, but we note that there is uncertainty in these estimates given the difficulty in predicting how implementation of the Vermont BE labeling law would have occurred absent the prospect of a national labeling law.").

[84] 83 Fed. Reg. 3,071.

[85] DEA, Economic Impact Analysis of Implementation of the Provision of the Comprehensive Addiction and Recovery Act of 2016 Relating to the Dispensing of Narcotic Drugs for Opioid Use Disorder at 13, 16 [Docket No. DEA-450] (Jan. 2018) .

[86] 83 Fed. Reg. 46,627.

[87] *Id.* at 46,637.

[88] *See supra* notes 30-33 and accompanying text.

[89] OMB, Circular A-4 at 14, 38 (2003) (explaining that transfer payments "do not affect total resources available to society"), https://www.whitehouse.gov/omb/circulars/. Circular A-4 was originally issued under President George W. Bush and the current administration has instructed agencies to follow it. OMB, Memorandum: Implementing Executive Order 13,771, Titled "Reducing Regulation and Controlling Regulatory Costs" (Apr. 5, 2017), https://perma.cc/NS6K-QLUZ.

[90] Borrower Defense Rule, 81 Fed. Reg. 75,926, 76,046 (Nov. 1, 2016).

[91] DOE Student Assistance General Provisions, 84 Fed. Reg. 49788, 49879 (Sept. 23, 2019) ("this final regulatory action is expected to have an annual effect on the economy of approximately $550 million in transfers among borrowers, institutions, and the Federal Government related to defense to repayment and closed school discharges, as well as $1.15 million in costs to comply with paperwork requirements.").

[92] Regulatory Reform: Completed Actions Fiscal Year 2017, *supra* note 4.

[93] Dep't of Interior, Repeal of Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform, 82 Fed. Reg. 36935, 36,951 (Aug. 7, 2017).

[94] OMB Accounting Methods, *supra* note 27.

[95] *See* Bridget C.E. Dooling, et. al., *Accounting for Regulatory Reform under Executive Order 13771: Explainer and Recommendations*, at 13-14 (Nov. 2019), *available at* https://www.brookings.edu/research/accounting-for-regulatory-reform-under-executive-order-13771/.

[96] *See, e.g.,* Oil and Gas and Sulfur Operations in the Outer Continental Shelf-Blowout Preventer Systems and Well Control Revisions, 84 Fed. Reg. 21,908, 21,964 (May 15, 2019) (cost savings calculated over 10 years); BSEE Oil and Gas and Sulphur Operations on the Outer Continental Shelf-Oil and Gas Production Safety Systems, 83 Fed. Reg. 49216, 49,252 (Sept. 28, 2018) (cost savings calculated over 10 years); 18-Month Extension of Transition Period and Delay of Applicability Dates, 82 Fed. Reg. 56545, 56,557 (Nov. 29, 2017) (cost savings calculated for 18-month delay).

[97] *See* Belton & Graham, *supra* note 7, at 875 (explaining that the administration's deregulation claims "lack credibility"); Stuart Shapiro, *Making Sense of the Trump Administration's Regulatory Numbers*, Regulatory Review (Jan. 14, 2020), https://www.theregreview.org/2020/01/14/shapiro-making-sense-trump-administration-regulatory-numbers (describing the cost savings numbers as exaggerated); *see also* Stuart Shapiro, *Deregulatory Realities and Illusions*, Regulatory Review (Nov. 12, 2018), https://www.theregreview.org/2018/11/12/shapiro-deregulatory-realities-illusions/ (same).

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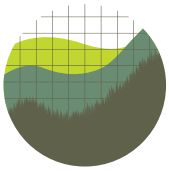

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