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By Joan MacLeod Heminway*

Donald J. Trump campaigned for election as President of the United States of America on a platform that, among other things, promised deregulation at the federal level. His campaign rhetoric was florid and strong.

> One of the keys to unlocking growth is scaling-back years of disastrous regulations unilaterally imposed by our out-of-control bureaucracy.
>
> Regulations have grown into a massive, job-killing industry—and the regulation industry is one business I will put an end to.
>
> In 2015 alone, federal agencies issued over 3,300 final rules and regulations, up from 2,400 the prior year. Every year, overregulation costs our economy $2 trillion dollars a year and reduces household wealth by almost $15,000 dollars.
>
> I've proposed a moratorium on new federal regulations that are not compelled by Congress or public safety, and I will eliminate all needless and job-killing regulations now on the books.[1]

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1. Tessa Berenson, *Read Donald Trump's Speech on Jobs and the Economy*, TIME (Sept. 15, 2016), http://time.com/4495507/donald-trump-economy-speech-transcript/.

Many may remember his specific campaign trail criticism of the Dodd–Frank Wall Street Reform and Consumer Protection Act,[2] comprehensive federal legislative regulation adopted in the wake of the 2008 financial crisis.[3] In the last few months of the campaign, Trump specifically targeted tax[4] and energy[5] reforms as key areas of emphasis. However, general promises of regulatory change, as well as other specific deregulation proposals and assurances, peppered candidate Trump's campaign trail missives.[6]

It often seems that campaign promises fall by the wayside after candidates for elected office are, in fact, elected. Yet, after his election as U.S. President, Trump followed through on his deregulatory promises with early executive orders and related initiatives. Business deregulation has occupied a central role in the Trump Administration's agenda. For those of us who represent business clients on a regular basis or teach in the business law area, this focus is of particular interest.

Information about the current administration's business deregulation initiatives is somewhat fragmented and its coverage in the media may be biased or politicized. In general, the administration and others who rely on simple success metrics present a rosy tale. The story line is easy to understand: deregulation is being achieved since there are fewer regulations and there is less regulatory cost. These positive reports often sound like puffery.

Research reports and related commentary generated by think tanks and other research organizations are a promising and less partisan

2. Pub. L. No. 111-203, 124 Stat. 1376 (2010).

3. *See, e.g.*, Reuters, *Donald Trump Says He Would Dismantle Dodd–Frank Wall Street Regulation*, FORTUNE (May 18, 2016), http://fortune.com/2016/05/18/trump-dodd-frank-wall-street/ ("Republican presidential candidate Donald Trump said on Tuesday that sweeping financial reforms put in place under President Barack Obama were harming the economy and he would dismantle nearly all of them.").

4. *See, e.g.*, Berenson, *supra* note 1 ("It begins with bold new tax reform."); *Read Donald Trump's Economic Speech in Detroit*, TIME (Aug. 8, 2016), http://time.com/4443382/donald-trump-economic-speech-detroit-transcript/ ("First, let's talk tax reform. Taxes are one of the biggest differences in this race.").

5. *See*, *e.g.*, Berenson, *supra* note 1 ("Energy reform is central to our plan as well."); *Read Donald Trump's Economic Speech in Detroit*, *supra* note 4 ("Also critical to our economic renewal will be energy reform."); John W. Miller, *Donald Trump Promises Deregulation of Energy Production*, WALL STREET J. (Sept. 22, 2016), https://www.wsj.com/articles/donald-trump-promises-deregulation-of-energy-production-1474566335.

6. *See, e.g.*, Berenson, *supra* note 1 ("One of the keys to unlocking growth is scaling-back years of disastrous regulations unilaterally imposed by our out-of-control bureaucracy. Regulations have grown into a massive, job-killing industry—and the regulation industry is one business I will put an end to."); *Read Donald Trump's Economic Speech in Detroit*, *supra* note 4 ("I will have one overriding goal when it comes to regulation: I want to keep jobs and wealth in America.").

source of information on deregulation. Yet these organizations have political agendas or policy biases of their own. Part II of this Essay offers summary reports on the recent deregulation publications of some of these research institutions. Their deregulation assessments are decidedly mixed, even if not always split simply along political lines. Regulatory change typically creates winners and losers; as a result, deregulatory reports often reflect the identity and bias of the reporter.

This Essay identifies and takes stock of the Trump Administration's deregulatory efforts as they impact business interests, with the thought that even incomplete or biased information may be useful to transactional business lawyering. What of significance has been done to date? With what articulated policy goals, if any? How may—or how should—the success of the administration's business deregulatory plans and programs be judged? What observations can be made about those successes? For example, who may win and lose in the revised regulatory framework that may emerge? The Essay approaches these questions from a transactional business law perspective and offers related observations. Spoiler Alert: to date, the deregulatory journey is characterized by haphazardness not unlike the motorcar experience that is the subject of the beloved Disneyland attraction, Mr. Toad's Wild Ride—a joyride that includes surprises and may sometimes feel like it is taking us "merrily, merrily, merrily, merrily, merrily on our way to nowhere in particular!"[7]

I. THE PRESIDENT'S BUSINESS DEREGULATORY AGENDA

Although presidents have some constitutional power to regulate and deregulate, they cannot alone completely effectuate any significant deregulatory agenda.[8] Having said that, their constitutional role and political status afford them a number of ways to direct or influence

7. *See The Original Mr. Toad's Wild Ride*, YESTERLAND, https://www.yesterland.com/mrtoad.html (last visited Nov. 14, 2018) (describing and summarizing the history of the attraction, and noting the ride's "catchy theme song . . . 'We're merrily, merrily, merrily, merrily, merrily on our way to nowhere in particular!'").

8. *See, e.g.*, Joan MacLeod Heminway, *Designing Deregulation: The POTUS's Place in the Process*, 88 UMKC L. REV. 653, 657 (2019) ("Under the Constitution, the congressional power to regulate conduct is therefore quite direct (even if not always perfectly clear)—more direct than the corresponding power granted to the president."); Stephen M. Johnson, *Indeconstructible: The Triumph of the Environmental "Administrative State,"* 86 U. CIN. L. REV. 653, 653 (2018) ("While the President can use a variety of tools, including the appointment power, budget power, treaty power, and executive orders, to influence the manner in which . . . agencies interpret and enforce laws, the President has very little power to unilaterally 'deconstruct the administrative state.' The 'administrative state' is a creation of Congress and the President can only 'deconstruct' it with the full cooperation of Congress.").

deregulation. These include both informal and formal means. For instance, informally, the president can set policy or signal regulatory change through the release of executive orders as well as in general speeches and communications, including in conferences with legislative leaders.[9] On a more formal level, the president's general constitutional power as the executive in appointing high-level government officials enables him to put into place deregulatory henchmen.[10]

However, the president also has other specific express constitutional powers that can have a deregulatory impact. These include the presidential power to veto, make treaties, seek opinions from federal officials, comment on the state of the union, and participate in ensuring faithful legal compliance.[11] The Trump Administration has employed these tools in forwarding the business deregulatory program heralded by the Trump presidential campaign.

For example, candidate Trump vowed to take immediate action on deregulation as president, promising in one speech, "Upon taking office, I will issue a temporary moratorium on new agency regulations."[12] He kept this campaign promise by signing an Executive Order on Reducing Regulation and Controlling Regulatory Costs in January 2017.[13] In principal part, the order requires the elimination of two existing regulations for each new regulation adopted and mandates that "the total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero."[14] Following on that initial executive order, in early February 2017, the Office of Management and Budget's Office of Information and Regulatory Affairs published a related guidance memorandum.[15] An additional memorandum was issued in April 2017.[16] In February 2017, the

9. *See* Heminway, *supra* note 8, at 662, 670–71.

10. *See id.* at 667–69.

11. *See id.* at 655–56, 662–67.

12. *Read Donald Trump's Economic Speech in Detroit*, *supra* note 4.

13. Exec. Order No. 13771, 82 Fed. Reg. 9339 (Feb. 3, 2017). Commentators commonly describe this as the president's "two-for-one executive order."

14. *Id.*

15. Memorandum from Dominic J. Mancini, Acting Admin., Office of Info. & Regulatory Affairs, to Regulatory Policy Officers at Exec. Dep'ts & Agencies & Managing & Exec. Dirs. of Certain Agencies & Comm'ns, Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled "Reducing Regulation and Controlling Regulatory Costs" (Feb. 2, 2017), http://www.whitehouse.gov/sites/whitehouse.gov/files/briefing-room/presidential-actions/related-omb-material/eo_iterim_guidance_reducing_regulations_controlling_regulatory_costs.pdf.

16. Memorandum from Dominic J. Mancini, Acting Admin., Office of Info. & Regulatory Affairs, to Regulatory Policy Officers at Exec. Dep'ts & Agencies & Managing & Exec. Dirs. of Certain Agencies & Comm'ns, Guidance Implementing Executive Order

president signed a further executive order, Enforcing the Regulatory Reform Agenda, articulating a "policy of the United States to alleviate unnecessary regulatory burdens placed on the American people" and processes for realizing that policy goal.[17]

In appointing members of his cabinet and other federal government officials, the president has chosen many individuals who have publicly affirmed that they share the president's vision for deregulation.[18] Perhaps most infamously, the president initially chose Scott Pruitt, a frequent and sharp critic of environmental regulation, to lead the Environmental Protection Agency.[19] The president's chosen successor to Pruitt, Andrew Wheeler, comes from a professional background that indicates a similar opposition to environmental regulation.[20] Other cabinet-level choices (including Secretary of Housing and Urban Development Ben Carson, Secretary of Education Betsy DeVos, former Secretary of Health and Human Services Tom Price, and Secretary of Commerce Wilbur Ross) have also raised fundamental questions about the desirability and efficacy of the regulatory scheme under their control—policy positions they held before their appointment as cabinet officials.[21]

13771, Titled "Reducing Regulation and Controlling Regulatory Costs" (Apr. 5, 2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf.

17. Exec. Order 13777, 82 Fed. Reg. 12285 (Feb. 24, 2017).

18. *See generally* Nick Timiraos & Andrew Tangel, *Donald Trump's Cabinet Selections Signal Deregulation Moves Are Coming,* WALL STREET J. (Dec. 8, 2017), https://www.wsj.com/articles/donald-trump-cabinet-picks-signal-deregulation-moves-are-coming-1481243006 ("Business leaders are predicting a dramatic unraveling of regulations on everything from overtime pay to power-plant emission rules as Donald Trump seeks to fill his cabinet with determined adversaries of the agencies they will lead.").

19. *See, e.g.*, Coral Davenport, *Senate Confirms Scott Pruitt as E.P.A. Head*, N.Y. TIMES (Feb. 17, 2017), https://www.nytimes.com/2017/02/17/us/politics/scott-pruitt-environmental-protection-agency.html; Chris Mooney et al., *Trump Names Scott Pruitt, Oklahoma Attorney General Suing EPA on Climate Change, to Head the EPA*, WASH. POST (Dec. 8, 2016), https://www.washingtonpost.com/news/energy-environment/wp/2016 /12/07/trump-names-scott-pruitt-oklahoma-attorney-general-suing-epa-on-climate-change-to-head-the-epa/?utm_term=.6c027995b772; Alexander Nazaryan, *How the EPA's Scott Pruitt Became the Most Dangerous Member of Trump's Cabinet*, NEWSWEEK (Feb. 8, 2018), https://www.newsweek.com/2018/02/16/scott-pruitt-most-dangerous-member-trump-cabinet-801035. html.

20. *See, e.g.,* Lisa Friedman, *Scott Pruitt's Environmental Rollbacks Stumbled in Court. His Successor Is More Thorough*, N.Y. TIMES (Nov. 21, 2018), https://www.nytimes.com/2018/11/21/climate/andrew-wheeler-epa.html; Ken Kimmell, *EPA Nominee Andrew Wheeler Is Even Worse than Scott Pruitt*, CNN (Jan. 15, 2019), https://www.cnn.com/2019/01/15/opinions/andrew-wheeler-bad-choice-epa-kimmell/index.html.

21. *See* Mooney et al., *supra* note 19; Timiraos & Tangel, *supra* note 18.

The president's deregulatory process has not included vetoes or treaty making. In fact, the president's veto threats and single veto to date to have been used to increase (rather than decrease) regulation through the construction of a more complete Mexican border wall. Late in 2018, the president threatened a budget veto because of Congress's reluctance to approve funds for the border wall, resulting in the longest federal government shutdown in history (following on an earlier veto threat in the spring of 2018),[22] and in March 2019, the president vetoed a joint resolution of Congress terminating his February 15 declaration of a national emergency relating to the Mexican border.[23] As for treaty making, an executive order was drafted (but never signed) calling for a moratorium on multilateral treaties.[24] International trade initiatives in the Trump presidency have largely enlarged regulation or constitute re-regulation; tariffs on imports have increased and conditions on favorable trade treatment have been enhanced.[25] In sum, "[w]hile

22. *See*, *e.g.*, Clare Foran, *Current Shutdown Breaks Record for Longest Government Shutdown in US History*, CNN (Jan. 12, 2019), https://www.cnn.com/2019/01/12/politics/government-shutdown-breaks-record-longest-ever/index.html; David Jackson, *Hours After Veto Threat, Trump Signs Spending Bill, Avoiding Government Shutdown*, USA TODAY (Mar. 23, 2018), https://www.usatoday.com/story/news/politics/2018/03/23/trump-threatens-veto-spending-bill-raises-possibility-government-shutdown/452273002/; Erica Werner et al., *Trump Says He Won't Sign Senate Deal to Avert Shutdown, Demands Funds for Border Security*, WASH. POST (Dec. 21, 2018), https://www.washingtonpost.com/business/economy/trump-continues-retreat-on-government-shutdown-threat-pledges-to-renew-border-control-battle-in-2019/2018/12/20/3143a752-0457-11e9-b6a9-0aa5c2fcc9e4_story.html?utm_term=.bb0b88645892.

23. *See Vetoes by President Donald J. Trump*, U.S. SENATE, https://www.senate.gov/reference/Legislation/Vetoes/TrumpDJ.htm (last visited Mar. 21, 2019).

24. *See Read the Trump Administration's Draft of the Executive Order on Treaties*, WASH. POST, https://apps.washingtonpost.com/g/documents/world/read-the-trump-administrations-draft-of-the-executive-order-on-treaties/2307/ (last visited Sept. 24, 2018).

25. *See, e.g.*, Chad P. Bown, *The 5 Surprising Things About the New USMCA Trade Agreement*, WASH. POST (Oct. 9, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/10/09/the-5-surprising-things-about-the-new-usmca-trade-agreement/?utm_term=.6deb9103b90f (commenting on, among other things, new conditions to tariff-free sales of automobiles and trucks into the United States from Canada and Mexico); Sheelah Kolhatkar, *Trump's Rebrand of NAFTA*, NEW YORKER (Oct. 3, 2018), https://www.newyorker.com/news/news-desk/trumps-rebrand-of-nafta ("The U.S.M.C.A. maintains NAFTA'S continental free-trade zone and most of its provisions, while offering some increased benefits to American workers."); Keith Naughton & Joe Deaux, *Ford Ratchets Up Rebuke of Trump Tariffs as Steel Costs Rise*, BLOOMBERG (Oct. 22, 2018), https://www.bloomberg.com/news/articles/2018-10-22/ford-says-trump-tariffs-makes-u-s-steel-costliest-in-the-world (noting the effects of Trump Administration steel tariffs on the U.S. automobile manufacturing industry); Jim Tankersley & Keith Bradsher, *Trump Hits China with Tariffs on $200 Billion in Goods, Escalating Trade War*, N.Y. TIMES (Sept. 17, 2018), https://www.nytimes.com/2018/09/17/us/politics/trump-china-tariffs-trade.html (reporting on new China tariffs and the then-current trade relations with China).

investment and trade are connected, the White House has been taking the two issues in opposite directions."[26]

In his 2018 and 2019 State of the Union addresses, the president focused some attention on deregulation, touting his administration's early gains in decreasing the size of the regulatory state.[27] For example, in his 2018 remarks he stated, "In our drive to make Washington accountable, we have eliminated more regulations in our first year than any administration in history."[28] He specifically claimed progress in the energy and auto manufacturing sectors.

> We have ended the war on American Energy—and we have ended the war on clean coal. We are now an exporter of energy to the world.
>
> In Detroit, I halted Government mandates that crippled America's autoworkers—so we can get the Motor City revving its engines once again.[29]

The president's use of first-person pronouns in this part of his address is noticeable—and especially his use of "I" in the last quoted sentence above. Among other things, he asserts control that exceeds the scope of his constitutional and practical authority.

The president also has communicated his deregulatory focus and successes through public statements and reports from cabinet agencies. The U.S. Department of the Treasury has been a leading messenger in this campaign, and its April 2018 report (the "Treasury Report")[30] is a prominent example. In that report, the Department of the Treasury professed that "[t]hrough a series of government-wide and agency-specific orders, the President has launched an historic effort to reduce existing red tape and limit new regulatory costs."[31] The reported

26. Riley Walters, *Trump Administration's Trade Policies Undermining Business Benefits of Tax Cuts, Slashing Regulations*, HERITAGE FOUND. (June 28, 2018), https://www.heritage.org/trade/commentary/trump-administrations-trade-policies-undermining-business-benefits-tax-cuts.

27. Donald J. Trump, *President Donald J. Trump's State of the Union Address*, WHITEHOUSE.GOV (Jan. 30, 2018), https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-state-union-address/; Donald J. Trump, *Remarks by President Trump in State of the Union Address*, WHITEHOUSE.GOV (Feb. 5, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-state-union-address-2/.

28. Trump, *President Donald J. Trump's State of the Union Address*, *supra* note 27.

29. *Id.*

30. U.S. DEP'T OF THE TREASURY, REGULATORY REFORM ACCOMPLISHMENTS UNDER PRESIDENT TRUMP'S EXECUTIVE ORDERS (Apr. 24, 2018), https://home.treasury.gov/sites/default/files/2018-04/20180423%20Regulatory%20Reform%20Report_0.pdf.

31. *Id.* at 1.

progress on the effort in the Department of the Treasury was summarized in the following chart published in the report:[32]

Treasury Department **Regulatory Reform Under President Trump's Executive Orders** ***By the Numbers***	
305	Treasury Regulations Eliminated or Proposed to Be Eliminated or Modified
94	Net Reduction in Regulations on Treasury's Regulatory Agenda
>250	Specific Treasury Recommendations to Reform & Reduce Burdens of Financial Regulation
0	Regulatory Actions Under Executive Order 13771

The Treasury Report consisted primarily of detailed information about deregulatory actions taken by the Department of the Treasury in various areas of regulatory activity under its control (for example, consumer financial protection and tax reform). The report concludes with an optimistic flourish:

> Treasury has undertaken extensive efforts to support the President's regulatory reform agenda . . . . Treasury's reports concerning domestic finance and tax regulation—which make forward-looking recommendations—will advance the President's policy of regulatory efficiency in support of lower individual and corporate compliance burdens and more robust economic growth for years to come.[33]

Earlier in 2017, the Department of the Treasury had issued a separate report on improving efficiency in bank and credit union regulation in which it detailed ways in which the department could engage the task of regulatory reform.[34]

Finally, the president has used his bully pulpit in other ways to forward his administration's deregulatory agenda. For example, he offered public remarks on deregulation in December 2017.[35] Somewhat more recently, he gave a deregulation speech at a Conservative Political

32. *Id.* at 2 (footnote omitted).

33. *Id.* at 20.

34. *See* STEVEN T. MNUCHIN & CRAIG S. PHILLIPS, U.S. DEP'T TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES (2017), https://www.treasury.gov/press-center/press-releases/Documents/A%20Financial%20System.pdf.

35. *See Remarks by President Trump on Deregulation*, WHITEHOUSE.GOV (Dec. 14, 2017), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-deregulation/.

Action Conference event.[36] Later still, in October 2018, he focused in on environmental deregulation in a talk for the National Electrical Contractors Association.[37] Overall, Trump's presidency has been characterized by significant public appearances that aggressively promote his proposed and actual deregulatory policies.

II. THIRD-PARTY ASSESSMENTS OF AND REACTIONS TO THE PRESIDENT'S DEREGULATORY REGIME

The media has commented extensively on the Trump presidency, including in the area of deregulation.[38] That commentary has been wide-ranging and, in general, highly politicized. Although the reporting of all responsible news outlets is founded on sourced facts, the choice of topic and angle can influence the conclusions reached by the authors. They do not purport to be—and generally are not—researchers of law or policy.

As a result, this Essay's survey of third-party commentary on the Trump deregulation regime focuses on think tanks and other research organizations. These research organizations do have well-known perspectives—they typically exist to serve as advocates for populations with specific policy objectives. However, the missions and perspectives of these organizations are publicly disclosed, and the researchers employ specified methodologies that permit synthesis, critique, verification, and rebuttal. The articulated mission and perspective of each is represented in the summary of its observations in this part.

A. American Action Forum

The American Action Forum is a relatively new policy research organization. Founded and established in 2009–2010, it claims to "proudly lead[] the center-right on economic and fiscal policy issues."[39] *AllSides* has not published a news media bias for the American Action

36. *See* Myron Ebell, *President Trump in CPAC Speech Says Deregulation is as Important as Tax Cuts*, COMPETITIVE ENTERPRISE INST. (Feb. 23, 2018), https://cei.org/blog/president-trump-cpac-speech-says-deregulation-important-tax-cuts.

37. *See* Susan Phillips, *Trump Touts Environmental Deregulation in Philadelphia*, WHYY (Oct. 3, 2018), https://whyy.org/articles/trump-touts-environmental-deregulation-in-philadelphia/.

38. Many of the sources cited in support of the claims made in Part I of this Essay are examples of this media coverage.

39. *About*, AM. ACTION F., https://www.americanactionforum.org/about/ (last visited Nov. 15, 2018).

Forum, but *Media Bias/Fact Check* concurs with the organization's own assessment that it has a Right-Center bias.[40]

The American Action Forum tracks key regulatory data through a project called Regulatory Rodeo. As of September 25, 2018, its data shows that 498 new regulations were enacted in 2017 and 2018 with a total finalized cost of $23.8 billion and a 23,858,014 hour decrease in paperwork.[41] The number of new regulations, their total finalized cost, and the number of paperwork hours, all decreased in 2018 from 2017, and the decrease in overall regulatory cost for 2018 is calculated at $6,762,024,341.[42] Only six new regulations were finalized in 2017 and 2018 in the areas of business assistance, commerce, and commercial practices, with a negative total finalized cost—$-4.5 million—and a total of 16,448 paperwork hours.[43]

As of May 2018, a summary article highlights that the Trump Administration is exceeding its two-for-one goal and its annualized savings objectives by $517.4 million, and that executive agencies are expected to double their annualized savings target.[44] Overall, the authors note that

> [t]his update is now the third from the Trump Administration, and its rulemaking record is becoming more fully formed. The administration is prioritizing deregulation, and it is set to double its goals of a two-for-one deregulatory-to-regulatory ratio and $686.6 million in net savings.[45]

This report is the least qualified in my sample, but it focuses narrowly on specific quantitative measures.

B. American Enterprise Institute

The American Enterprise Institute was founded in 1938.[46] It "is a public policy think tank dedicated to defending human dignity,

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40. *See American Action Forum*, MEDIA BIAS/FACT CHECK, https://mediabiasfact check.com/american-action-forum/ (last visited Nov. 15, 2018).

41. *See Explore the Data*, REGULATION RODEO, http://regrodeo.com/ (last visited Sept. 25, 2018) (viewing data for 2017 and 2018).

42. *Id.*

43. *Id.*

44. *See* Dan Bosch & Dan Goldbeck, *The Trump Administration's Deregulatory Progress and Forecast*, AM. ACTION F. (May 21, 2018), https://www.americanactionforum.org/research/the-trump-administrations-deregulatory-progress-and-forecast/#ixzz5S7I2TNRv.

45. *Id.*

46. *About*, AEI, http://www.aei.org/about/ (last visited Nov. 15, 2018).

expanding human potential, and building a freer and safer world."[47] *AllSides* classifies its media bias as Lean Right.[48] *Media Bias/Fact Check* indicates that the American Enterprise Institute has a Right bias.[49]

To date, the American Enterprise Institute mostly offers articles and blog posts in support of its positions on the Trump Administration's deregulatory efforts. For example, an October 2017 article posits, "[T]he problem of excessive regulation was so severe, and has been such an impediment to economic growth, that the mere slowing of new regulations can stimulate substantial new business confidence, investment, and hiring. And a slowing has occurred since Donald Trump took office."[50] Later, in February 2018, a post noted that the Trump deregulatory agenda then appeared to have had a limited economic effect, citing a Goldman Sachs report.[51] A more recent article expresses a similar cautionary tale.[52] As with the Brookings Institution publications referenced *infra* Part II.C., the American Enterprise Institute offerings make limited assessments at this point in the Trump Administration's tenure.

C. The Brookings Institution

The Brookings Institution is "the first private organization devoted to analyzing public policy issues at the national level."[53] Founded in 1916, its "mission is to conduct in-depth research that leads to new ideas for solving problems facing society at the local, national, and global level."[54]

47. *Id.*

48. *See American Enterprise Institute*, ALLSIDES, https://www.allsides.com/news-source/american-enterprise-institute (last visited Nov. 15, 2018).

49. *See American Enterprise Institute*, MEDIA BIAS/FACT CHECK, https://mediabiasfactcheck.com/american-enterprise-institute/ (last visited Nov. 15, 2018).

50. Peter J. Wallison, *Trump's Deregulation Efforts Are Driving Market Dynamism*, AEI (Oct. 13, 2017), http://www.aei.org/publication/trumps-deregulation-efforts-are-driving-market-dynamism/.

51. *See* James Pethokoukis, *What's Been the Economic Impact of Trump's Deregulation Push?*, AEI (Feb. 12, 2018), http://www.aei.org/publication/whats-been-the-economic-impact-of-trumps-deregulation-push/.

52. *See* James Pethokoukis, *Has Donald Trump Really Made America (Economically) Great Again?*, AEI (June 25, 2018), http://www.aei.org/publication/has-donald-trump-really-made-america-economically-great-again/ ("[I]t could take years before economists are able to tease out any significant growth impacts from cutting business taxes or deregulation. In economic projections, there are no guarantees—other than Trump will surely try to take credit.").

53. *See Brookings Institution History*, BROOKINGS, https://www.brookings.edu/about-us/brookings-institution-history/ (last visited Nov. 14, 2018).

54. *About Us*, BROOKINGS, https://www.brookings.edu/about-us/ (last visited Nov. 14, 2018).

AllSides categorizes the Brookings Institution as Center.[55] *Media Bias/Fact Check* classifies the Brookings Institution as having a Left-Center bias.[56]

The Brookings Institution is tracking current deregulatory initiatives on an ongoing basis on a part of its website.[57] It describes the tracking application as follows:

> The Brookings Deregulatory Tracker (Reg Tracker) is a tool that tracks and provides insights into deregulatory actions under the Trump administration. Launched in October 2017, the Reg Tracker monitors a curated selection of delayed, repealed, and new rules, notable guidance and policy revocations, and important court battles. The rules span a wide range of policy areas, including but not limited to education, finance, environment, and transportation.[58]

In the financial regulation area, for example, the tracker features a number of business deregulation initiatives, including the repeal of the Department of Labor's fiduciary rule (which imposed a fiduciary duty on financial professionals advising on retirement assets or retirement planning) after a March 2018 opinion and order of the United States Court of Appeals for the Fifth Circuit invalidated the rule.[59] Brookings identifies several different types of deregulatory conduct: "[r]educing restrictions on conduct"; "[r]emoving outdated, inconsistent, or otherwise unnecessary rules"; "[e]liminating particular disfavored regulatory impacts"; and "[i]ncreasing competition in a regulated market."[60]

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55. *Brookings Institute*, ALLSIDES, https://www.allsides.com/news-source/brookings-institute (last visited Nov. 14, 2018).

56. *Brookings Institute*, MEDIA BIAS/FACT CHECK, https://mediabiasfactcheck.com/brookings-institute/ (last visited Nov. 14, 2018).

57. *Tracking Deregulation in the Trump Era*, BROOKINGS (Feb. 22, 2019), https://www.brookings.edu/interactives/tracking-deregulation-in-the-trump-era/ (updated regularly) (last visited Feb. 22, 2019).

58. Siddhi Doshi et al., *Explaining the Brookings Deregulatory Tracker,* BROOKINGS (Oct. 18, 2018), https://www.brookings.edu/blog/up-front/2018/10/18/explaining-the-brookings-deregulatory-tracker/.

59. *Tracking Deregulation in the Trump Era*, BROOKINGS, https://www.brookings.edu/interactives/brookings-deregulatory-tracker/ (last visited Nov. 14, 2018).

60. *See* Connor Raso, *What does "Deregulation" Actually Mean in the Trump Era?*, BROOKINGS (Nov. 1. 2017), https://www.brookings.edu/research/what-does-deregulation-actually-mean-in-the-trump-era/.

Coauthors of a Brookings Institution report, issued in October 2017, expressed concern that the president's two-for-one executive order will fail to achieve regulatory efficiency and effectiveness.[61]

> [I]n the United States the regulatory budget will attempt to get much closer to real social costs, at the expense of adding considerable complexity. That makes it potentially more meaningful and deep reaching, but also more likely to bog down and create a massive bureaucratic headache to go with those that already exist.
>
> That makes the disappointing scenarios for the regulatory budget rather plausible, but not inevitable: that it will become not an engine for reform, but instead will provide a blunt instrument that either obstructs new regulations (irrespective of whether or not they are welfare-enhancing) or leads to new regulations coupled with haphazard cutting of existing regulations (again, failing to distinguish between the [sic] those that do and do not enhance social welfare).[62]

In a blog post close in time to the release of the two-for-one executive order, I raised similar issues in a somewhat more lighthearted way, analogizing the two-for-one concept to closet cleaning.[63]

The coauthors of the October 2017 report ultimately conclude that the efficacy of this type of "regulatory budget" depends on how the regulators and those who are regulated use this deregulatory tool, placing the key responsibility in the hands of Trump Administration officials.[64]

> [I]f it turns out that the most that can be said about the economic burdens of regulation is that some people like to lodge more or less aesthetic complaints about them—then regulatory budgeting will fail. But if, as seems more likely, there are lots of opportunities to bring old regulations up to date with modern realities, and plenty of accumulated detritus to clear out, then the regulatory budget offers a

61. *See* TED GAYER ET AL., EVALUATING THE TRUMP ADMINISTRATION'S REGULATORY REFORM PROGRAM 11 (2017), https://www.brookings.edu/wp-content/uploads/2017/10/evaluatingtrumpregreform_gayerlitanwallach_102017.pdf.

62. *Id.* at 16.

63. Joan Heminway, *Cleaning Out the Regulatory Closet: An Analogy for Consideration . . .*, BUS. L. PROF. BLOG (Feb. 6, 2017), https://lawprofessors.typepad.com/business_law/2017/02/cleaning-out-the-regulatory-closet-an-analogy-for-consideration-.html; *see also* Joan Heminway, *Balancing the Regulatory Budget: Another Analogy for Consideration*, BUS. L. PROF. BLOG (Feb. 20, 2017), https://lawprofessors.typepad.com/business_law/2017/02/balancing-the-regulatory-budget-another-analogy-for-consideration.html (last visited Nov. 15, 2018).

64. GAYER ET AL., *supra* note 61, at 16.

much needed spur to action. It is up to the administration to carefully work this system out and realize this best-case scenario.[65]

If the coauthors are correct, the quality of the appointed officials may make a difference. The president has broad authority to appoint high-level officials who can implement the president's plan.[66]

Several other Brookings Institution deregulatory policy pieces assess Trump era deregulation initiatives. A June 2018 article finds that "agencies under Trump significantly reduced the total amount of rulemaking relative to prior administrations across the board."[67] More specifically, a brief article published in September 2018 concludes that, to date, "[o]n balance, . . . the picture is one of inaction. The Trump Administration has halted the growth of regulation that imposes costs but so far has left the existing regulatory framework largely in place."[68] The aggregate picture is quite mixed, but overall, the authors seem to be taking a too-early-to-tell view on the success of the Trump deregulatory agenda.

D. Cato Institute

The Cato Institute was founded in 1977.[69] It engages in "public policy research . . . dedicated to the principles of individual liberty, limited government, free markets, and peace."[70] It considers its researchers "independent" and "nonpartisan."[71] *AllSides* classifies the Cato Institute (blog) media bias rating as Lean Right.[72] According to *Media Bias/Fact Check*, the Cato Institute has a Right-Center bias.[73]

A March 2017 article offers hope that the Trump deregulation plan may be efficacious (averring that "the cost limit and the one-in, two-out requirement . . . could be useful exercises to cull poor federal

65. *Id.* at 17.

66. *See supra* text accompanying note 10.

67. Connor Raso, *Where and Why Has Agency Rulemaking Declined Under Trump?,* BROOKINGS (June 29, 2018), https://www.brookings.edu/research/where-and-why-has-agency-rulemaking-declined-under-trump/.

68. Connor Raso, *How Has Trump's Deregulatory Order Worked in Practice?,* BROOKINGS (Sept. 6, 2018), https://www.brookings.edu/research/how-has-trumps-deregulatory-order-worked-in-practice/.

69. *See About CATO*, CATO INST., https://www.cato.org/about?utm_source=cato_header &utm_medium=menu&utm_campaign=submenu (last visited Nov. 15, 2018).

70. *Id.*

71. *Id.*

72. *See Cato Institute (blog)*, ALLSIDES (Nov. 15, 2018), https://www.allsides. com/news-source/cato-institute.

73. *See Cato Institute*, MEDIA BIAS/FACT CHECK, https://mediabiasfactcheck.com/cato-institute/ (last visited Nov. 15, 2018).

regulations"), while at the same time expressing some concern that the Trump Administration has the wherewithal to achieve its deregulatory potential.[74] Somewhat more recently, in December 2017, a Cato author notes that the expansion of trade regulation represents an obvious counterbalance to the Trump Administration's deregulatory efforts.[75] An April 2018 article offers general deregulatory praise, while noting that financial services need specific deregulatory attention.[76] As with research published by the Brookings Institution and the American Enterprise Institute, Cato's publications temper optimism with caution and advice.

E. Center for American Progress

The Center for American Progress describes itself as "an independent nonpartisan policy institute that is dedicated to improving the lives of all Americans, through bold, progressive ideas, as well as strong leadership and concerted action."[77] Among its expressed values is the belief that "an effective government can earn the trust of the American people, champion the common good over narrow self-interest, and harness the strength of our diversity."[78] *AllSides* rates the Center for American Progress as Lean Left,[79] and *Media Bias/Fact Check* describes it as having a Left bias.[80]

As a left-leaning research organization, the Center for American Progress is not focused on counting the number of regulations adopted or rescinded, or calculating reductions in regulatory cost. Instead, in

74. *See* Thomas A. Firey, *Dire Fears of Trump Deregulation*, CATO INST. (Mar. 13, 2017), https://www.cato.org/blog/dire-fears-trump-deregulation ("[T]he devil is in the details, and the Trump administration's performance so far gives little confidence about its ability to manage details.").

75. Simon Lester, *Deregulation vs. More Regulation in the Trump Administration*, CATO INST. (Dec. 29, 2017), https://www.cato.org/blog/deregulation-vs-regulation-trump-administration ("Nevertheless, when you hear people tout Trump's push for lessening the burden of regulation, keep in mind that with trade policy, we are seeing a regulatory expansion.").

76. *See* Diego Zuluaga, *Financial Services Deregulation*, CATO INST. (Apr. 9, 2018), https://www.cato.org/publications/commentary/financial-services-deregulation ("Regulatory rollback has been a bright spot of this administration, but financial services remain clogged by red tape. For financial innovation and credit access to reach all Americans, that must change.").

77. *About*, CTR. FOR AM. PROGRESS, https://www.americanprogress.org/about/mission/ (last visited Nov. 19, 2018).

78. *Id.*

79. *See Center for American Progress*, ALLSIDES, https://www.allsides.com/news-source/center-american-progress (last visited Nov. 19, 2018).

80. *See Center for American Progress*, MEDIA BIAS/FACT CHECK, https://mediabiasfactcheck.com/center-for-american-progress/ (last visited Nov. 19, 2018).

measuring deregulatory success, its researchers are focused on the substantive changes effected by deregulation. For example, three economic policy experts affiliated with the Center for American Progress cautioned against financial deregulation in a December 2017 research report.[81] Asserting that "[t]he painful memory of the 2007–2008 financial crisis is clearly fading for some policymakers in the Republican-led Congress and the Trump administration,"[82] the researchers offer policy proposals on a number of different financial regulatory matters that they see as important in lessening our susceptibility to another financial crisis. They suggest that other financial regulatory reforms also would be beneficial.[83] Additional deregulatory commentary from the Center for American Progress relates to, for example, its effects on workers and the environment.[84]

F. The Heritage Foundation

The Heritage Foundation was founded in 1973 and self-classifies strongly as a conservative "research and educational institution."[85] "The mission of The Heritage Foundation is to formulate and promote

81. Gregg Gelzinis et al., *Resisting Financial Deregulation*, CTR. FOR AM. PROGRESS (Dec. 4, 2017), https://www.americanprogress.org/issues/economy/reports/2017/12/04/443611/resisting-financial-deregulation/.

82. *Id.*

83. *Id.*

84. *See, e.g.*, Osub Ahmed et al., *Scott Pruitt Threatens Reproductive and Environmental Justice for Women*, CTR. FOR AM. PROGRESS (Apr. 24, 2018), https://www.americanprogress.org/issues/women/news/2018/04/24/450034/scott-pruitt-threatens-reproductive-environmental-justice-women/ (identifying and describing "four ways Administrator Pruitt's actions on energy and the environment threaten to harm women's health and reproductive justice."); Sam Berger, *Commentary: How Trump is Letting Businesses Steal Money from Workers,* FORTUNE (Jan. 31, 2018), http://fortune.com/2018/01/31/state-of-the-union-trump-deregulation/?iid=sr-link1 ("Trump has been attacking regulations that protect workers' pay, retirement, and safety in order to pad company profits."); CAP Energy & Dev. Team, *Hands Off Our Air, Water and Public Lands*, CTR. FOR AM. PROGRESS (May 24, 2018), https://www.americanprogress.org/issues/green/news/2017/05/24/432929/hands-off-air-water-public-lands/ ("[E]ven though two out of every three American voters oppose drilling in the Arctic National Wildlife Refuge, Trump's budget proposes opening this ecologically sensitive and iconic landscape for drilling—and the inevitable oil spills that follow petroleum development."); David Madland, *Under President Trump, Workers Continue to Struggle*, CTR. FOR AM. PROGRESS (Sept. 11, 2018), https://www.americanprogress.org/issues/economy/reports/2018/09/11/457811/president-trump-workers-continue-struggle/ ("A number of Trump's policies, such as his massive tax cuts for the wealthy and corporations, have helped the rich gain an ever-growing share of the economy while doing relatively little for most workers.").

85. *About Heritage*, HERITAGE FOUND., https://www.heritage.org/about-heritage/mission (last visited Nov. 15, 2018).

conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense."[86] The Heritage Foundation's *AllSides* media bias is Lean Right.[87] *Media Bias/Fact Check* categorizes the Heritage Foundation as having a Right bias.[88]

Like the publications of other research organizations represented in this Essay, an early 2018 article published by the Heritage Foundation notes an overall decrease in regulation in calendar year 2017.[89] In calling out specific areas for attention, the summary in that article focused largely on deregulation outside the business sphere; however, the author did address the then current state of the fiduciary rule.[90] In more recent articles published on the site, additional issues are addressed and some theoretical analysis is provided.

For example, in one recent piece, a Heritage Foundation author attributes the current strong economy and employment numbers to Trump-era tax reform and deregulation.[91] In another recent article, two commentators note that "'Buy American' policies may not always make America's economy great again, as they have the ability to thwart the dynamic gains from international trade—a key benefit of economic freedom."[92] They offer strong counsel and prescriptions in concluding that

> [e]conomic policy founded in protectionist principles, while well-intentioned for some sectors, has the power to stifle American progress in other parts of the economy.

86. *Id.*

87. *See The Heritage Foundation*, ALLSIDES, https://www.allsides.com/news-source/heritage-foundation (last visited Nov. 15, 2018).

88. *See Heritage Foundation*, MEDIABIAS/FACTCHECK (Nov. 15, 2018), https://mediabiasfactcheck.com/heritage-foundation/.

89. *See* Diane Katz, *10 Ways the Trump Administration Beat Back Excessive Regulation in 2017*, HERITAGE (Jan. 2, 2018), https://www.heritage.org/government-regulation/commentary/10-ways-the-trump-administration-beat-back-excessive-regulation ("Federal rulemaking slowed dramatically in 2017, with the Trump administration issuing two-thirds fewer regulations in its first year (1,136) than both Presidents Barack Obama (3,356) and George W. Bush (3,927).").

90. *Id.*

91. *See* David W. Kreutzer, *A Great Day for Workers in America*, HERITAGE (Nov. 2, 2018), https://www.heritage.org/jobs-and-labor/commentary/great-day-workers-america.

92. *See* Amanda Snell & Anthony B. Kim, *Tariff Exemptions Don't Cut It. Just Shave Off Trade Barriers*, HERITAGE (Nov. 6, 2018), https://www.heritage.org/trade/commentary/tariff-exemptions-dont-cut-it-just-shave-trade-barriers.

> Dynamic economic growth depends not only on preserving a competitive, transparent business climate, but also on ensuring the open markets on which so much of America's prosperity has been built.
>
> Tax cuts and deregulation have been generating strong economic growth of more than 3 percent in recent quarters.
>
> The U.S. economy can grow even more if tariffs are lowered and protectionist policies get dismantled.[93]

This article, like an earlier piece published in June 2018,[94] juxtaposes the president's increased trade regulation with his tax reform and deregulatory activities.[95]

Other notable deregulation articles from earlier in the year address the overlap of The Heritage Foundation's budget policy blueprint with the president's budget[96] and the unfocused nature of the president's economic plan.[97] The Heritage Foundation's website proved to be a relatively rich source of commentary. The offerings included both praise for and criticism of the president's policies and implementation.

G. Institute for Policy Studies

"As Washington's first progressive multi-issue think tank, the Institute for Policy Studies (IPS) has served as a policy and research resource for visionary social justice movements for over four decades."[98] The IPS engages in a variety of different projects to help ensure that "everyone has a right to thrive on a planet where all communities are equitable, democratic, peaceful, and sustainable."[99] *AllSides* has not

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93. *Id.*

94. *See* Riley Walters, *Trump Administration's Trade Policies Undermining Business Benefits of Tax Cuts, Slashing Regulations*, HERITAGE (June 28, 2018), https://www.heritage.org/trade/commentary/trump-administrations-trade-policies-undermining-business-benefits-tax-cuts.

95. Snell & Kim, *supra* note 92.

96. *See* Romina Boccia & Dody Eid, *Trump Budget Embraces Numerous Conservative Reforms*, HERITAGE (June 22, 2018), https://www.heritage.org/budget-and-spending/commentary/trump-budget-embraces-numerous-conservative-reforms.

97. *See* Paul Winfree, *Trump's Economic Agenda Is Unfocused. Here's How to Fix It*, HERITAGE (July 5, 2018), https://www.heritage.org/taxes/commentary/trumps-economic-agenda-unfocused-heres-how-fix-it.

98. *About*, INST. FOR POL'Y STUD., https://ips-dc.org/about/ (last visited Nov. 19, 2018).

99. *Our Work*, INST. FOR POL'Y STUD., https://ips-dc.org/our-work/ (last visited Nov. 19, 2018).

rated the IPS; *Media Bias/Fact Check* indicates that the IPS has a Left bias.[100]

Like the Center for American Progress, the IPS focuses on the economic, environmental, and societal effects of deregulation as opposed to regulatory volume or cost. Many of the areas of its work have been (and continue to be) impacted by current and proposed deregulatory initiatives introduced by the Trump Administration. For example, financial and energy deregulation have predicted effects on economic justice and climate justice.[101]

The IPS's director of Foreign Policy in Focus addressed financial deregulation in a September 2018 article in which he forecasted more inequality.[102]

> Economic inequality is not an unintended consequence of deregulation. It's one of the goals. You might think that the administration simply wants to move as much money as it can to the 1 percent before the debt hits the fan. But here's the really depressing part. The wealthy make out like bandits during an economic downturn as well.[103]

According to this September 2018 article, deregulatory success for businesses and the more prosperous may create economic inequality that translates to short-term or long-term economic loss for other constituencies.[104]

The IPS also recently criticized energy regulation policy, focusing in on the air pollution and related human life consequences of coal deregulation in an August 2018 article.[105]

> [T]he government is again going to war in support of mine owners by deregulating coal-fired power plants. This time, the target of the war isn't striking workers—it's the public.
>
> Casualties in this war are projected to be steep. By the government's own estimate, up to 1,600 people a year are going to die from the

100. *See Institute for Policy Studies*, MEDIABIAS/FACTCHECK, https://mediabiasfactcheck.com/institute-policy-studies/ (last visited Nov. 19, 2018).

101. *See* John Feffer, *There's a New Crash Coming,* INST. FOR POL'Y STUD. (Sept. 19, 2018), https://ips-dc.org/theres-a-new-crash-coming/; Basav Sen, *Killing for Coal (Literally),* INST. FOR POL'Y STUD. (Aug. 28, 2018), https://ips-dc.org/killing-for-coal-literally/.

102. *See* Feffer, *supra* note 101.

103. *Id.*

104. *Id.*

105. *See* Sen, *supra* note 101.

> additional soot and ozone pollution by 2030, thanks to its proposed rules.[106]

The IPS and other, more progressive research organizations compel us to look beyond quantitative analyses of deregulatory success to qualitative factors involving the effects of regulatory cutbacks in terms of, for example, economic, environmental, and societal cost.

H. Mercatus Center

The mission of the Mercatus Center, founded over forty years ago as the Center for the Study of Market Processes,[107] "is to generate knowledge and understanding of the institutions that affect the freedom to prosper and to find sustainable solutions that overcome the barriers preventing individuals from living free, prosperous, and peaceful lives."[108] Deregulation is one of its research topics of emphasis.[109] Although neither *AllSides* nor *Media Bias/Fact Check* rates the Mercatus Center, it is well known to be a conservative think tank funded in part by the Koch Family Foundations.[110]

The Mercatus Center, like The Heritage Foundation, notes slower regulatory growth in the first year of the Trump Administration.[111] Specifically, cited data indicates that

> [d]uring President Trump's first year, federal regulations grew by about 0.65 percent, less than the growth rate of any other president's first year in office since our data begin in 1970. This rate of growth is

106. *Id.*

107. *See History and Timeline*, MERCATUS CTR., https://www.mercatus.org/content/history-and-timeline (last visited Nov. 19, 2018).

108. *About*, MERCATUS CTR., https://www.mercatus.org/about (last visited Nov. 18, 2018).

109. *See Regulation*, MERCATUS CTR., https://www.mercatus.org/tags/regulation (last visited Nov. 18, 2018) ("Mercatus research on regulation identifies opportunities to improve the performance of the regulatory process and highlights market-based solutions to regulatory goals.").

110. *See Mercatus Center*, SOURCE WATCH, https://www.sourcewatch.org/index.php/Mercatus_Center (last visited Nov. 18, 2018).

111. *See* Patrick McLaughlin & Chad Reese, *Is President Trump Dismantling the Regulatory State?*, MERCATUS CTR. (Feb. 1, 2018), https://www.mercatus.org/bridge/commentary/president-trump-dismantling-regulatory-state ("While regulatory restrictions have still increased since President Trump took office, they have grown at a much slower pace than has historically been the case.").

> also less than one-third of the long-term annual growth rate for federal regulations, which, from 1970 to 2016, was about 2.1 percent.[112]

In August 2018, a Mercatus Center research fellow expressed cautious optimism that the limited growth of regulation during the Trump Administration could have a positive economic impact,[113] while being careful not to attribute current positive economic trends to the Trump Administration's deregulatory policies.[114]

In an October 2018 opinion column, a Mercatus senior research fellow similarly cites to the Trump Administration's claimed deregulation success (as a function of regulatory cost savings), while also noting that this success is relatively limited and that the process of deregulation forwarded by the administration is capable of improvement.[115] "The new regulatory budgeting system is a much needed step in the right direction, likely delivering some meaningful relief to citizens. But the new system is far from perfect, and already we are seeing areas where it could be improved."[116] Among other things, the column suggests that measuring cost may not be the optimal way to measure true deregulatory effect, for a variety of reasons.[117] "If the administration instead relied on a simpler measure than cost, it could create an accounting system for the entire federal regulatory system."[118]

III. ADDITIONAL OBSERVATIONS ABOUT THE IMPACT OF THE PRESIDENT'S DEREGULATORY REGIME

The publications and resources of think tanks and other research organizations in Part II identify a number of success metrics (for example, number of regulations eliminated or adopted; decrease in paperwork hours or regulatory cost; impact on employment, the economy, or social welfare; etc.) that bear significantly more scrutiny—scrutiny that this Essay does not permit. It is safe to say, however, that the

112. Patrick McLaughlin, *Regulatory Data on Trump's First Year*, MERCATUS CTR. (Jan. 30, 2018), https://www.mercatus.org/publications/regulatory-data-trump-first-year.

113. *See* James Broughel, *Regulation Rollback and the 'Trump Bump'*, MERCATUS CTR. (Aug. 10, 2018), https://www.mercatus.org/bridge/commentary/regulation-rollback-and-trump-bump ("The regulatory tide has slowed to a crawl. This may be giving the economy a needed reprieve, with the potential for greater gains to come.").

114. *Id.*

115. James Broughel, *How to Improve Trump's Regulatory Budget*, WASH. EXAMINER (Oct. 26, 2018), https://www.washingtonexaminer.com/opinion/op-eds/how-to-improve-trumps-regulatory-budget.

116. *Id.*

117. *Id.*

118. *Id.*

salience of the various metrics largely depends on context. Specifically, deregulatory success relates to the extent to which the desired outcomes of the deregulation have been achieved. Thus, under these metrics, success is somewhat in the eye of the beholder; each observer has a perspective founded on its core policy mission that is reflected in its choice of a success metric and mode of assessment.

Yet, the impacts of business deregulation can be evaluated in several value-neutral ways. For example, one might ask whether the deregulation results in positive changes in the regulated businesses and whether these actual substantive deregulatory benefits exceed the attendant costs—including specifically, transition costs and costs associated with a loss of public trust. In this part of the Essay, I reflect briefly on these cost-benefit questions.

Those who favor deregulation for substantive operational reasons (including, in the business realm, to decrease the costs associated with manufacturing or distributing goods or providing services) may assume that their deregulatory program always actually results in the expected salutary effects. Yet, regulation may persist in the wake of deregulation, including at the firm level. There are a number of reasons for this.

Firm-level regulatory personnel may resist the return to a less regulated operational state. "The increased hordes of in-house regulators will 'not go gentl[y] into that good night.' That is, they will attempt to fortify their influence within the firm regardless of deregulation . . . . [I]n-house regulators have their own incentives and want to keep their jobs even in a deregulatory environment."[119]

Moreover, regulation that decreases the cost of production in the short term may result in long-term harms in the form of increased litigation risk or other losses. One observer notes the long-term effects of deregulating an aspect of building construction:

> A few years back, California's then governor, Arnold Schwartzenegger [sic], signed a bill easing fire prevention regulation during construction of buildings that resulted in short-term savings for some builders. But when a major fire in March 2014 destroyed a large building under construction in San Francisco, owners of nearby buildings also destroyed by the fire—and insurance companies

119. Kirby M. Smith, *In-House Regulators: Documenting the Impact of Regulation on Internal Firm Structure*, 36 YALE J. ON REG. BULL. 22, 24 (2018) (footnote omitted); *see also* Samantha Gross, *The Danger in Deregulation,* BROOKINGS (Jan. 9, 2018), https://www.brookings.edu/blog/planetpolicy/2018/01/09/the-danger-in-deregulation/ ("Many companies, particularly large international corporations, are unlikely to substantially change their practices in response to the regulatory rollback.").

> covering the hundreds of millions in damages—were left wondering if the short-term savings had been worth it.[120]

If deregulation creates known increased litigation prospects, a regulated business may decide to continue to conduct business consistent with its pre-deregulatory practices.[121]

In addition, in certain cases, businesses may be hesitant to abandon a regulatory regime that has prompted net beneficial introspection or operational change.

> [T]he recent court ruling removing the section of the Dodd-Frank Act requiring manufacturers to disclose the source of minerals used in their products (to determine if they came from areas in Africa where human rights abuses are rife) may prove . . . to be a pyrrhic victory for business. Doubtless, the due diligence required in tracing the supply chain of tin, tungsten, and tantalum back to their original sources demands a costly process of investigation, but my sources in Silicon Valley privately confide that they were benefiting from taking a closer look at their supply chains, hoping to find ways to substitute for some expensive minerals, and identify more cost-effective sources of others. One manager told me this process was causing his company to examine easy assumptions they had made about their operations that, on closer scrutiny, didn't hold up.[122]

In other words, regulation may create indirect benefits that motivate sustained reliance on related processes and initiatives even when the regulatory burden is reduced or eliminated.

It also is significant to note that deregulation, like all regulatory change, causes transition costs. These costs exist regardless of the purported or actual substantive merit of the deregulation from a legal, social, political, or economic perspective.[123] They comprise, for example,

120. James O'Toole, *The Hidden Business Benefits of Regulation*, STRATEGY+BUS. (Apr. 24, 2014), https://www.strategy-business.com/blog/The-Hidden-Business-Benefits-of-Regulation?gko=61916.

121. *See, e.g.*, Gross, *supra* note 119 ("Many companies, particularly large international corporations, are unlikely to substantially change their practices in response to the regulatory rollback, as they have global operating procedures to prevent safety and environmental incidents that could harm their assets or reputation."); Smith, *supra* note 119, at 45 ("[O]nce a monitoring system is put into place, it may act as a one-way ratchet—the Board will be unlikely to remove the system because it fears that it may subject it to *Caremark* liability.").

122. O'Toole, *supra* note 120.

123. *See generally* Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789, 869 (2002) ("[A]part from customary debates about substantive benefits and costs, legal systems will experience friction simply in adjusting to the existence of new legal norms.").

costs associated with learning the new regulatory regime, various types of uncertainty, reviewing and revising practice forms and materials, changes to transactional practice conventions and norms, misinterpretations or misapplications of the new rules, and governmental adjustments to processes and procedures.[124]

As a result, the fact of regulatory change may be detrimental enough for some of the regulated that they would prefer to stay in a stable regulated state than be subjected to deregulation and re-regulation in response to political, social, or economic changes.[125] This desire to entrench in a pre-existing regulatory state in response to deregulation is consistent with observed benefits of "sticky" regulations—rules that are hard to change because of ossification. Specifically, continued voluntary compliance with regulatory constraints after deregulation, like sticky regulations, has value because the attendant certainty and predictability of applicable rules may encourage market participation.[126]

Finally, there may be reputational and trust-related costs or questions arising from deregulation that should be assessed and addressed. Deregulation may be interpreted as privatization—a government abandonment of certain people or sectors, fostering potential negative impacts on public trust.[127] Reflecting on business deregulation during the Carter and Reagan presidencies, one commentator offered his view that "[d]eregulation was very good for a small elite group of investors and owners, but not good for the large group of workers in every industry."[128]

124. *See id.* at 816–52.

125. *See, e.g.*, Gross, *supra* note 119 ("[T]he energy industry invests primarily in capital-intensive, long-lived assets . . . . A stable policy environment is important to these investments. Regulations and policy that are created in one administration can be rolled back in another, and the instability creates a challenge for managing and valuing such assets. Energy companies crave regulatory certainty.").

126. *See* Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 116–17 (2018) ("Ossification . . . acts as a commitment mechanism. Absent this mechanism, basic economics suggests that regulated parties sometimes would be less likely to participate in the market, or at least to participate as much as the agency would like, because the investment would be riskier." (footnote omitted)).

127. *See, e.g.*, Gross, *supra* note 119 ("[T]he hard push toward deregulation is likely to have consequences for public trust . . . . If the public feels that the government is being run by and for the energy industry, accomplishing many important societal goals—like modernizing infrastructure and preventing the worst impacts of climate change—become much more difficult.").

128. Michael Collins, *Did Deregulation Work?*, INDUSTRY WEEK (Oct. 26, 2016), https://www.industryweek.com/regulations/did-deregulation-work.

IV. FORESEEABLE EFFECTS OF DEREGULATION ON BUSINESS TRANSACTIONS AND TRANSACTIONAL LAWYERING

In theory, deregulation should open up possibilities for business transactions—new or larger transactions. In 2017, the Council of Economic Advisors articulated the standard rationale for this theoretical observation: "Regulations serve as an additional tax on the U.S. economy, often making beneficial economic transactions more expensive or preventing them outright."[129] Remove the tax, and the incentives for engaging in those beneficial transactions become more favorable.

Regardless, regulatory change—including deregulation—always seems to generate significant activity for lawyers. This is as true for transactional business lawyers as it is for other lawyers. Among other things, transactional business lawyers must engage with and understand deregulation in their roles as transaction cost engineers—intermediaries in business transactions who use their applied knowledge of the law to cost-optimize transactional structures and execution for their clients.

Twenty-five years ago, Professor Ronald Gilson expressly identified this aspect of business transactional lawyering, labeling it "transaction cost engineering."[130] Effectively, "[t]he regulatory system itself . . . serves as an invitation to the targets of the regulation to structure transactions so that their form falls outside the terms of the regulation."[131] That being the case, a transactional business lawyer's correct and complete understanding of the regulatory or deregulatory environment in which the client's transaction occurs is key to the lawyer's value proposition. A business transactional lawyer can only assess transaction costs in a

129. COUNCIL ECON. ADVISORS, THE GROWTH POTENTIAL OF DEREGULATION 1, 10 (Oct. 2, 2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/documents/The%20Growth%20Potential%20of%20Deregulation.pdf.

130. Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 255 (1984) [hereinafter Gilson, *Value Creation*]. Specifically, Gilson theorizes as follows:

> Lawyers function as *transaction cost engineers*, devising efficient mechanisms which bridge the gap between capital asset pricing theory's hypothetical world of perfect markets and the less-than-perfect reality of effecting transactions in this world. Value is created when the transactional structure designed by the business lawyer allows the parties to act, *for that transaction*, as if the assumptions on which capital asset pricing theory is based were accurate.

Id. (emphasis in original). *See also* Ronald J. Gilson, *Lawyers as Transaction Cost Engineers*, *in* THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 508–14 (Peter Newman ed., 1998) (expanding on the transaction cost engineering theory); Praveen Kosuri, *Beyond Gilson: The Art of Business Lawyering*, 19 LEWIS & CLARK L. REV. 463, 468 (2015) ("Gilson concluded that business lawyers earn their keep by engineering deals to increase overall value by decreasing inefficiencies.").

131. Gilson, *Value Creation*, *supra* note 130, at 297.

specific context with accuracy if the lawyer can identify the applicable legal rules and apply them impeccably to select the best available option that will result in the client's desired outcome.

As the Trump Administration proceeds, many regulatory systems connected to business operations and transactions are undergoing significant change. Deregulation is especially prevalent, and it interacts in some cases in complex ways with increased regulation (for example, through the increase in tariffs and other international trade barriers and restrictions).[132] These regulatory adjustments both reify and complicate the business transactional lawyer's role: the lawyer is both essential and challenged.

The difficulty of the advisory context is exacerbated by an unclear overall regulatory/deregulatory plan. The president's decisions on deregulation appear to be made individually and discretely. They are not expressly connected to other applicable regulatory questions and systems or a uniform policy objective. The resultant uncertainty and unpredictability combine to put stress on the task of netting out transaction costs and benefits. If legal counsel cannot accurately or completely assess the effects of applicable deregulation, parties may forego efficient transactions or enter into inefficient transactions. This advisory environment puts the transactional business lawyer at risk for reputational harm and, in exceptional cases, malpractice claims.

Professor Steven Schwarcz expanded on Professor Gilson's theory by identifying specific ways in which transactional business lawyers are central to transaction cost engineering.[133] One of Professor Schwarcz's contributions is of particular importance in a deregulatory environment: the lawyer's role in identifying, assessing, factoring in, and minimizing litigation risk.[134] Litigation risk is a moving target when regulatory systems are in transition. This observation does not change the lawyer's role, but it does make it more difficult.

V. CONCLUSION

The Trump Administration has followed through on candidate Trump's promises to deregulate by using the informal and formal powers of the presidency to effectuate and catalyze specific deregulatory initiatives. Reform projects are being undertaken. Both the Trump Administration and interested third-party observers have begun to assess early successes. These commentators may, however, be missing

132. *See supra* notes 35 & 36 and accompanying text.

133. *See* Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486 (2007).

134. *Id.* at 492, 496–97.

some significant elements in their individual and collective assessments. In any event, the overall deregulatory agenda and its objectives—beyond the simple end goal of decreasing regulation (whatever that may mean to interested constituencies)—remain unclear.

Among the impacted constituencies are businesses and their legal counsel. Both have an opportunity to evaluate and respond. Business clients may incur or anticipate short-term or long-term costs that can be avoided or minimized with focused preparation or action. These clients will, no doubt, need lawyers (including business transactional lawyers) to help ensure that they avoid or minimize these costs in operating and transacting.

Observations made in this Essay may ultimately affect assessments of the success of the Trump deregulation project, at least through the lens of the business transactional lawyer. On the positive side, transactional business lawyers likely are getting and will continue to get new business and generate fees from the regulatory changes. Clients who are repeat players in affected transactions will need new advice. To be competent to give that advice, their lawyers will need to review, interpret, and process the application of the new rules resulting from the deregulatory modifications. Those lawyers may then be in a position to suggest adjustments to business operations and create new contracts, forms, and other operating tools and market them to existing or new clients. Similarly, a transactional business lawyer can use her knowledge of the deregulatory environment to promote new or different transactions to past, current, or new clients. In addition, transactional business lawyers may be involved in compliance enforcement actions under the new regulatory regime.

On the negative side, uncertainty and unpredictability are likely to plague both the business client and transactional business counsel. The nature and trajectory of deregulation may be unclear. Moreover, offsetting increases in regulation may complicate the lawyer's applied legal analysis of transaction costs and regulatory and litigation risk in the new and expected deregulation environments. Evaluations of deregulatory success should take these costs and risks into account.

In any event, as the Trump deregulatory experiment proceeds, transactional business lawyers and their clients may sometimes find themselves on the regulatory version of Mr. Toad's Wild Ride—an uncertain and unpredictable excursion through uncharted and unfamiliar territory. Managing the adventure successfully will involve perseverance as well as competence and diligence. The road may be bumpy and the lawyer and client may end up off-roading at times. But, as with other significant changes that impact transactional business lawyering, deregulation in the Trump era is bound to provide healthy challenges to transactional lawyering heuristics. The rewards of carrying on and completing the journey are certain to be substantial and provide business counsel with useful educational opportunities.