



Written by [Veronique de Rugy](#) on May 10, 2018

Taming the Tyranny of the Agency

The tyranny of the administrative state is real and hard to tame. Americans would be horrified if they knew how much power thousands of unelected bureaucrats employed by federal agencies wield. These members of the “government within the government,” as *The New York Times’* John Tierney describes them, produce one freedom-restricting, economy-hindering rule after another without much oversight. These rules take many forms, and few even realize they’re in the making — until, that is, they hit you square in the face.



Take the Consumer Financial Protection Bureau’s rule that effectively banned car dealers from giving auto loan discounts to customers on the claim that they might lead to racial discrimination (a dubious conclusion reached using flawed statistical models). Dodd-Frank, the legislation that created the CFPB, prohibited it from regulating auto dealers — so the CFPB quietly put out a “guidance” document to circumvent due process and congressional oversight.

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Thankfully, this time around, someone noticed. In recent weeks, the Senate passed a resolution of disapproval under the Congressional Review Act — a streamlined procedure for Congress to repeal regulations issued by various federal government agencies. The House is expected to follow suit soon and send the bill to the president’s desk, if it hasn’t already by the time you read this.

In a major blow against regulatory overreach, the Government Accountability Office correctly determined that this “guidance” is, in reality, a rule and subject to congressional review. Even though the CFPB never submitted a report to Congress (as required by law for new rules), pretended that this wasn’t a new rule and tried to regulate without any supervision, the rule still fell within the window for congressional review.

Informal regulations are all too common, but they’re not the only form of regulatory abuse. Midnight regulations, or the spike of regulatory activity that occurs right before lame-duck administrations leave office, are another scourge. My former colleague Jerry Brito and I documented the sad phenomenon several years ago. We found large regulatory surges with outgoing administrations and smaller — but worth noticing — surges when incumbent presidents were re-elected. We also found that the quality of regulatory analysis for midnight regulations is poorer than average. The review is rushed, and the oversight is light to nonexistent — meaning a lot of rules that shouldn’t go through do.

One such rule was issued by the Obama administration a mere week before Donald Trump was sworn in to office. Once fully implemented, it will damage a program that brings foreign investment into the U.S. economy, by arbitrarily raising the cost to participate in the program.

The EB-5 visa program, which currently allocates 10,000 employment-based green cards annually for foreigners who invest and create jobs in the United States, ought to transcend the political controversy



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surrounding most immigration questions. In brief, it has brought in over \$20 billion in foreign investment over the past decade and led to an estimated 174,000 American jobs. Many other nations recognize the value in attracting job creators through these “economic citizenship” programs. The same logic that drove corporate tax reform — recognizing the need to compete with other powerful economies — ought to also drive support for shoring up the EB-5 program.

Contributing to the problem is the fact that Congress usually provides only short-term extensions of the program, leaving its future in doubt, rather than tackle long-term reform. Though that’s frustrating, it’s not a good reason to let regulators assume responsibility for reshaping the program themselves, which they do by pushing new investment requirements when nobody is watching. This dramatically curtails a valuable initiative. By withdrawing this Obama-era rule, the Trump administration could shift the responsibility back to Congress to properly settle the issue.

These are only two examples, though there are hundreds of thousands just like them. In the name of an expedited process, Congress delegated some powers to these unelected bureaucrats to write laws, interpret them and enforce them in their own courts, with their own judges. But the whole thing has snowballed out of control. As Tierney notes, “in volume and complexity, the edicts from federal agencies exceed the laws passed by Congress by orders of magnitude.” So much for the Constitution.

It’s time for the legislators we actually elected to reclaim these unchecked powers and do their jobs before the next round of midnight regulations takes more of our freedoms away.

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