

Synopsis

Unrules: The Hidden Face of Power and Discretion in the Administrative State

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The word “regulation” connotes constraint. Regulations are usually thought of as restrictions or prescriptions that impose costly burdens on businesses and other organizations. As a result, both academic research and policy discourse related to regulation have focused on actions taken by administrative agencies to impose obligations on private actors. Political scientist Herbert Kaufman has described the typical conception of regulation-as-constraint in the following way:

We all hate to be told we have to do something or may not do something. Even if we actually enjoy the compulsory tasks and dislike the forbidden ones, the command rankles. The element of compulsion itself is distasteful. And it is much worse if we are forced to do what we don’t want to do, and are prohibited from doing what we strongly want to do. Today, you can hardly turn around without bumping into some federal restraint or requirement.

With this conception of regulation in mind, it is hardly surprising how many academic papers, policy reports, and political arguments make note of persistent growth in the body of regulatory law in the United States. Economist Steve Davis and his collaborators, for example, recently observed that pages of federal regulations “rose more than six-fold after 1950, highlighting a tremendous expansion in the extent and complexity of federal regulations.” But even fifteen years ago, journalist Cindy Skrzycki observed that “[c]ritics of regulation are fond of piling high stacks of *Federal Registers* on the floor of the House of Representatives or the Senate, or at a press conference, to prove their point that federal regulation has become expansive and overbearing.” In December 2017, Donald Trump did very much the same thing at a White House press event at which he decried “an ever-growing maze of regulations, rules, restrictions.”

Yet, as legal theorists have on occasion observed, rules also can contain within them limitations on obligations—or what we call “unrules.” Some of these unrules comprise exceptions or other limitations embedded in regulations that circumscribe their scope. These obligation-avoiding unrules we refer to as “carveouts.” Other unrules authorize administrative agencies to grant waivers, exemptions, or variances from otherwise applicable rules. These obligation-lifting unrules we call “dispensations.” Sometimes a dispensation takes the form of a formal granting of a waiver or variance, while other times it simply takes the form of nonenforcement—what might be thought of as constructive dispensation.

In this project, we seek to bring into empirical focus the extent to which the regulatory corpus comprises restrictive obligations versus obligation-alleviating unrules. We seek to advance beyond the literature’s emphasis on the number of pages or number of rule documents in the *Federal Register*, showing how this emphasis has lumped obligatory words together with obligation-avoiding and obligating-lifting words. In short, we seek to subject to empirical scrutiny the usual assumption—as Kaufman and others would imply—that the entire corpus is restrictive.

We approach our task primarily through computer-assisted content analysis of several sources of regulatory law: the *Federal Register*, the Code of Federal Regulations, and the U.S. Code. I will focus here, for reasons of space, on our results from our analysis of the *Federal Register*. We approached that analysis in several different ways.

First, we adapted an approach used by a group of economists and computer scientists at George Mason University's Mercatus Center. In keeping with the field's usual focus on regulation as constraint, the Mercatus analysis quantifies the number of "restrictive" terms in regulatory law ("shall," "must," "may not," "prohibited," and "required"). By contrast, we created a comparable dictionary of "flexible" terms: "waive," "exclude," "except," "exempt," and "variance." Flexible words occur with considerable frequency. For example, the pages of the *Federal Register* in 2016 contained 146,894 occurrences of flexible words, with a ratio of 1 flexible word for every 4.7 restrictive words. The frequency of flexible words has been increasing over the period 1936 to 2016.

Second, we analyzed the "action" field in the *Federal Register* from 1979-2016, finding that terms such as "waiver" and "exemption" were present in an average of 576 documents per year, which amounts to a ration of 1 unrule action for every 9 final rules. If we look to the document titles from 1996 to 2017, we find 1.02 percent and 2.28 percent of all notices in the *Federal Register*, compared to .09 percent and .11 percent for the terms "require" and "prohibit." The term "exempt" is actually found in the titles of 9 percent of the notices for final rules.

Third, we looked closely at economically significant regulations published in the *Federal Register*. These are rules expected to impose economic impacts greater than \$100 million per year. On average across all economically significant rules from 1982 to 2016, the ratio was 1 flexible word for every 6 restrictive terms.

Separate analyses of the Code of Federal Regulations and the U.S. Code found similar evidence indicating that that unrules are a frequent, if not even integral, part of regulatory law in the United States.

We believe our empirical findings about the ubiquity of unrules document the pervasiveness of flexibility in the regulatory system and establish the importance of including unrules in the study of regulation and regulatory politics—both to expand positive research but also to address key normative concerns. Unrules can be quite valuable from a social welfare standpoint if they allow for the tailoring of rules under different circumstances to effectuate regulatory goals. In other words, they can moderate regulations' tendencies toward over-inclusiveness. However, unrules can also be abused. Not only can the proverbial exception end up swallowing the rule, but also the narrower, sometimes case-by-case, nature of unrules may make them prone to be used as a tool of special interests, as they seek carveouts or dispensations to advantage themselves at the expense of the broader public.

At a minimum, we believe three broad implications follow from our central finding that unrules constitute a substantial component of federal regulation. First, to the extent that public and scholarly perceptions about the costs of regulation have been affected by references to page and rule counts, with the assumption that these data are entirely restrictive, our research finding challenges those perceptions. The regulatory system is much less restrictive—and thus presumably much less costly—than has been widely perceived. For the same reason, of course, it could also be potentially less beneficial too.

Second, an acknowledgment of the ubiquity of unrules should shift how scholars of regulatory politics approach their research. To date, researchers have defined regulatory politics in terms of a battle over regulatory *stringency*, pitting government and public interest groups against a largely monolithic “business.” The abundance of unrules shows that a more realistic research frame must include attention to conflicts over regulatory *scope* as well as stringency. Unrules also force greater recognition of the fact that regulatory politics involves competing interests *between* businesses—with some firms seeking carveouts to avoid obligations or striving to persuade regulators to grant them dispensations.

Finally, our research drives home the current opacity of many unrules, especially dispensations. We provide evidence showing how difficult it is to find out information about how agencies use their dispensation authority. For the vast majority of legal provisions authorizing dispensations, we were unable to find information about how often—and for whom—dispensations were granted. Without greater transparency, we cannot know how often unrules are used as rent-seeking tools nor how frequently they become the proverbial exceptions that swallow the rule.