

## 2017 Regulatory Year in Review

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This Regulatory Insight highlights ten important regulatory and deregulatory themes that garnered attention—and changed the regulatory landscape—in 2017. Regulatory policy was a focal point of 2017, and notable executive orders, rulemaking, and legislation all contributed to this theme.

### 1. President Trump's Deregulatory Agenda

On January 30, 2017, President Trump signed [Executive Order 13771](#) on “Reducing Regulation and Controlling Regulatory Costs.” The EO requires agencies to eliminate two regulations for every new one issued (known as “one-in-two-out” or “two-for-one”), and limits the total incremental cost of all new regulations, including repealed ones, to \$0 for fiscal year 2017.

In response to this EO, the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) issued [guidance](#) for agencies to clarify the scope and implementation of its provisions. The OMB guidance specifies that the EO applies to “significant regulatory actions” issued by executive agencies (i.e. excluding independent agencies) and that regulatory costs should be measured as the opportunity cost to society as defined in [Circular A-4](#), and it clarifies that non-significant rules can be considered “deregulatory actions” to offset new significant rules.

While not as newsworthy, President Trump signed [Executive Order 13777](#) on February 24, titled “Enforcing the Regulatory Reform Agenda.” This EO provides direction for implementing EO 13771 by requiring heads of regulatory agencies to designate an agency official as the Regulatory Reform Officer (RRO) to oversee the implementation of regulatory reform initiatives and policies, and form a Regulatory Reform Task Force to make recommendations for agency regulatory reforms. In late April, OMB also issued [guidance](#) on EO 13777. The guidance clarifies the EO’s requirements and establishes minimum performance indicators for agencies’ annual performance plans.

### 2. Unified Agenda of Regulatory and Deregulatory Actions

Since 1978, federal agencies have been required to publish agendas of regulatory and deregulatory activities. The Unified Agenda of Regulatory and Deregulatory Actions is a

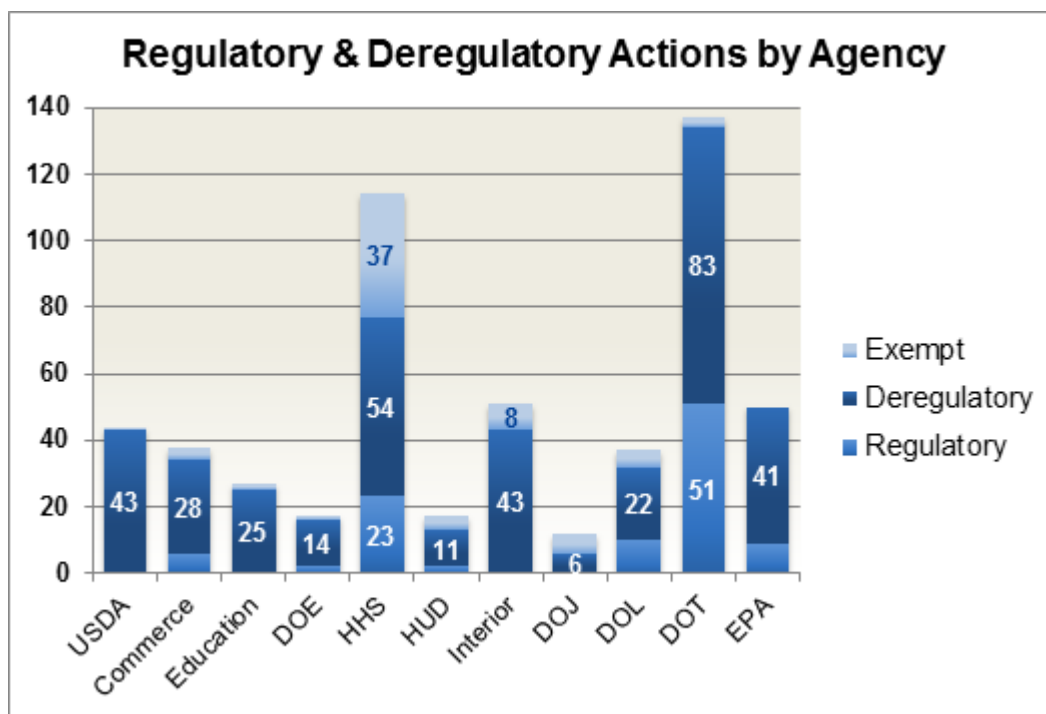
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semiannual compilation of agencies' agendas published in the spring and fall; the Trump administration's Spring and Fall 2017 Agendas provide the public with an important glimpse of the administration's regulatory (and deregulatory) priorities for the next year. It appears that the Unified Agenda will be the vehicle that the Administration uses to track compliance with the requirements of the EOs above.

In contrast to the Spring 2017 Agenda, the Fall 2017 Agenda shows which planned agency actions are regulatory or deregulatory, allowing observers to know how the Trump administration plans to implement its deregulatory policies. The Fall 2017 Agenda includes hundreds of deregulatory activities, including 83 planned deregulatory activities from the Department of Transportation (DOT) and 54 from the Department of Health and Human Services. Though many agencies list no regulatory activities that qualify for offsets under EO 13771, they do list a number of actions that are fully or partially exempt from those requirements.

These deregulatory actions play an important role in accomplishing the Trump administration's regulatory priorities. On September 7, OIRA issued a [memo](#) instructing agencies to propose a Fiscal Year 2018 regulatory cost budget for their agency representing a net reduction in total incremental regulatory costs. Consistent with that condition, the final regulatory [cost allowances](#) published in the Fall Agenda indicate that agencies commit to accomplishing \$686 million in annualized (net) regulatory cost savings in FY 2018.



Source: The GW Regulatory Studies Center, 2017

## 3. Disapproval of Rules under the Congressional Review Act

As part of his deregulatory efforts, President Trump signed [15 congressional resolutions](#) disapproving federal regulations under the Congressional Review Act (CRA) during 2017. The CRA allows Congress to use [expedited procedures](#) to disapprove a final rule issued by a federal agency. Congress generally has 60 legislative days after a final rule is issued to review it, but an incoming Congress can also review the last 60 days of rules issued during the previous Congress. Nevertheless, the CRA had not been actively used prior to the current Congress—before 2017, Congress had only successfully used the CRA to overturn a regulation once, in 2001.

The 15 rules overturned using the CRA were issued by 13 agencies, including independent agencies. Notably, the [fifteenth resolution](#) signed on November 1 disapproving the Consumer Financial Protection Bureau (CFPB)’s [arbitration rule](#) marks the first time a president had disapproved a regulation issued during his own tenure. It also [implies](#) that additional rules issued by independent agencies may be vulnerable to CRA disapproval.

Congressional Review Act Tracker 2017

The George Washington University Regulatory Studies Center—Updated 11/1/2017

Bill	Title	Issuing Agency	Rule	Passed House	Passed Senate	Sent to President	President's Signature
S.J. Res. 34	Protecting the Privacy of Customers of Broadband and Other Telecommunications Services	FCC	81 FR 87274	3/28	3/23	3/30	4/3
H.J. Res. 36	Waste Prevention, Production Subject to Royalties, and Resource Conservation	BLM	1004-AE14	2/3	Failed		
H.J. Res. 37	Federal Acquisition Regulation; Fair Pay and Safe Workplaces	DOD/GSA	9000-AM81	2/2	3/6	3/16	3/27
H.J. Res. 38	Stream Protection Rule	DOI	1029-AC63	2/1	2/2	2/6	2/16
H.J. Res. 40	Implementation of the NICS Improvement Amendments Act of 2007	SSA	0960-AH95	2/2	2/15	2/16	2/28
H.J. Res. 41	Disclosure of Payments by Resource Extraction Issuers	SEC	3235-AL53	2/1	2/3	2/6	2/14
H.J. Res. 42	Federal-State Unemployment Compensation Program; Middle Class Tax Relief and Job Creation Act of 2012 Provision on Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants	ETA	1205-AB63	2/15	3/14	3/21	3/31
H.J. Res. 43	Compliance With Title X Requirements by Project Recipients in Selecting Subrecipients	HHS	81 FR 91852	2/16	3/30	4/5	4/13
H.J. Res.44	Resource Management Planning	BLM	1004-AE39	2/7	3/7	3/16	3/27
H.J. Res. 57	Elementary and Secondary Education Act of 1965, as Amended by the Every Student Succeeds Act-Accountability and State Plans	ED	1810-AB27	2/7	3/9	3/16	3/27
H.J. Res. 58	Teacher Preparation Issues	ED	1840-AD07	2/7	3/8	3/16	3/27
H.J. Res. 66	Savings Arrangements Established by States for Non-Governmental Employees	DOL	1210-AB71	2/15	5/3	5/5	5/17
H.J. Res. 67	Savings Arrangements Established by Qualified State Political Subdivisions for Non-Governmental Employees	DOL	1210-AB76	2/15	3/30	4/5	4/13
H.J. Res. 69	Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska	FWS	1018-BA31	2/16	3/21	3/27	4/3
H.J. Res. 83	Clarification of Employer's Continuing Obligation To Make and Maintain an Accurate Record of Each Recordable Injury and Illness	DOL	1218-AC84	3/1	3/22	3/27	4/3
H.J. Res. 111	Arbitration Agreements	CFPB	3170-AA51	7/25	10/24	10/25	11/1

Source: *The GW Regulatory Studies Center, 2017*

In an October 19 letter, the Government Accountability Office (GAO) confirms that the CRA’s definition of “rule” includes guidance documents that did not go through notice-and-comment

rulemaking. The GAO letter expands the scope of the CRA's disapproval mechanism to hundreds or even [thousands of sub-regulatory statements](#) never submitted to congress.

## 4. The Accountability of the CFPB

The constitutionality of the CFPB has been challenged since it was created via the Dodd-Frank Act in 2010 as an independent agency headed by a single individual rather than by a commission. These issues came to a head in October 2016, when a D.C. Circuit Court of Appeals panel [ruled](#) that the CFPB's uniquely independent structure was unconstitutional. In a separate August 2017 case, a federal district court judge [reached](#) the opposite conclusion. The D.C. Circuit Court is currently hearing an *en banc* appeal of the 2016 decision, and observers expect the question may go to the Supreme Court. Meanwhile, Congress and the president exercised some control over the bureau by [disapproving](#) its arbitration rule using the CRA in November.

On November 24, the resignation of the CFPB director created another constitutional [flare up](#). On his last day, CFPB's first director Richard Cordray appointed his chief of staff, Leandra English, to be Deputy Director, asserting that gave her authority to serve as Acting Director based on a clause in the Dodd-Frank Act. A few hours later, the White House announced that President Trump would select OMB Director Mick Mulvaney to serve as CFPB's Acting Director, pursuant to the Federal Vacancies Reform Act. Both English and Mulvaney appeared for work, but in response to a lawsuit English filed, the U.S. District Court for the District of Columbia (as well as the CFPB's own general counsel) [sided with the president](#) and Mulvaney.

## 5. Review of WOTUS Rule

On February 28, President Trump signed [Executive Order](#) 13778 directing the Administrator of the Environmental Protection Agency (EPA) and the Assistant Secretary of the Army for Civil Works to review their 2015 rule defining "Waters of the United States" (WOTUS). The rule had attempted to codify Justice Kennedy's opinion in [Rapanos v. United States](#), that jurisdiction extends to waters with a "significant nexus" to navigable waters. However, the agencies' definition was controversial, leading thirty-one states and other parties to seek judicial review in multiple venues. On October 9, 2015, the Sixth Circuit Court of Appeals issued a [nationwide stay](#) of the rule.

In EO 13778, President Trump directed the agencies to interpret the term "navigable waters" in a manner consistent with Justice Scalia's opinion in *Rapanos* arguing that jurisdiction only extends to waters with "a continuous surface connection" with navigable waters. Pursuant to the EO, the agencies published a [proposed rule](#) on July 27 to rescind the definition of WOTUS established by the 2015 rule and re-codify the regulations that existed before. The agencies also plan to pursue a notice-and-comment rulemaking including a re-evaluation of the definition of WOTUS.

In January, the U.S. Supreme Court will review whether the Sixth Circuit had original jurisdiction to stay the 2015 rule. To address the regulatory uncertainty during the Supreme Court review, EPA and the Army Corps of Engineers [proposed](#) on November 22 to add to their 2015 rule an applicability date two years in the future so that the rule will not go into effect if the stay is lifted before their pending rulemaking is finalized.

## 6. Repeal of the Clean Power Plan

On March 28, President Trump signed [Executive Order](#) 13783 establishing a policy for the regulation of energy resources, including a goal of affordable electricity. The EO instructs the EPA Administrator to review the [Clean Power Plan](#) (CPP) for consistency with this policy and to revise or rescind the rules if necessary. The EO also instructs agencies to value carbon emissions using methods described in Circular A-4 rather than the “social cost of carbon” set by the Obama Administration. The CPP, which establishes guidelines for state plans to reduce greenhouse gas emissions from existing fossil fuel-fired power plants, was issued on October 23, 2015 under section 111(d) of the Clean Air Act (CAA).

After a 6-month review pursuant to EO 13783, EPA published a [proposed rule](#) in October 2017 to repeal the CPP in its entirety, stating that the CPP “exceeds the EPA’s statutory authority.” CAA section 111(d) requires EPA to set emission guidelines reflecting the “best system of emission reductions,” which EPA has applied in the past to mean reductions achievable by the best technology used by existing plants. The proposed rule argues that the CPP departed from this practice by requiring states to shift their source of fuel (e.g., away from coal), rather than increasing the carbon efficiency of existing power generators across the grid.

In a draft [Regulatory Impact Analysis](#) (RIA) accompanying the proposed repeal, EPA uses a social cost of carbon that takes into account domestic (rather than global) social costs and uses 3% and 7% discount rates (rather than 2.5% used in the previous RIA for CPP) to monetize the foregone benefits from CO<sub>2</sub> reductions. EPA has not determined if it will issue a new rule to regulate GHG emissions from existing electric utility generating units. The [public comment](#) period for the proposed repeal is open until January 16, 2018.

## 7. Midterm Evaluation of the CAFE Standards

In the 2012 [rulemaking](#) establishing the corporate average fuel economy (CAFE) greenhouse gas standards (GHG) for model years (MY) 2017-2025 light vehicles, EPA committed to conduct a “midterm evaluation” on the appropriateness of the CAFE standards for MY 2022-2025 and issue a determination by April 1, 2018. On November 30, 2016, a full 16 months ahead of the deadline, EPA’s outgoing Administrator Gina McCarthy [hastily](#) proposed her determination to maintain the standards for MY 2022-2025. The [final determination](#), released in January 2017, stated that “the standards are feasible at reasonable cost.”

On March 22, 2017, the current DOT Secretary Elaine Chao and EPA Administrator Scott Pruitt jointly announced their intent to reconsider EPA's midterm evaluation. On August 21, DOT and EPA published a [proposed rule](#) seeking public comments on their intention for reconsideration. EPA is also requesting comments on whether the light-duty vehicle GHG standards for MY 2021 remain appropriate. The public comment period closed on October 5, and EPA is still subject to the April 1, 2018 deadline to make a new final determination.

## 8. Revocation of Net Neutrality Rules

On June 2<sup>nd</sup>, the Federal Communications Commission (FCC) published a [proposed rule](#) that would reverse the classification of internet service providers (ISPs) as “common carriers” under Title II of the [Communications Act of 1934](#) and return to the classification of ISPs as lightly-regulated “information services” under Title I. It would also “reinstate the determination that mobile broadband Internet access service is not a commercial mobile service.”

The reclassification of ISPs is associated with various operating requirements related to “net neutrality”—a principle that ISPs must treat all Internet traffic equally (i.e. no discrimination or differentiated charges). Prior to 2015, ISPs were classified as information services under Title I, which gave the FCC “ancillary authority” to regulate them. In light of President Obama's urge for a more active role for FCC in regulating the Internet, the FCC passed an [Open Internet Order](#) along party lines in a 3-2 vote on February 26, 2015, reclassifying ISPs as common carriers under Title II. The Order was [finalized](#) on April 13, 2015.

Following the 2017 proposal to reclassify ISPs, Chairman Pai announced his [draft Restoring Internet Freedom Order](#) to revoke the 2015 net neutrality rules on November 21. In a 3-2 party-line vote at its December 14 Open Meeting, the FCC [repealed](#) what the majority called the “2015 heavy-handed utility-style regulation” of ISPs.

## 9. Payday Loan Rule

On November 17, the CFPB [finalized](#) its rule on “Payday, Vehicle Title, and Certain High-Cost Installment Loans” (known as the “Payday Loan Rule”). This 450-page rule regulates “the underwriting of covered short-term and longer-term balloon-payment loans, including payday and vehicle title loans.” The rule requires lenders to verify whether consumers are able to repay covered loans, though CFPB declined to finalize ability-to-repay requirements for certain high-cost installment loans. In addition, the rule establishes a 30-day cooling-off period for consumers who have already taken out three loans in a row. CFPB's final RIA projects that the rule will reduce payment loan volumes by 62 to 68 percent, but result in a positive welfare impact for consumers. On the other hand, critics [argue](#) that the new rule is harmful for vulnerable consumers, leaving millions of Americans with few or no affordable loan options.

## 10. Regulatory Approaches for New Technologies

Facing unprecedented emergence of new technologies, DOT is undertaking regulatory approaches for automated driving systems (or driverless cars) and unmanned aerial systems (UAS, including drones) to ensure public safety while accelerating technological development.

On September 15, DOT released an updated [policy guidance](#) on driverless cars. The new voluntary guidance is based on public comments received on the department's 2016 [Federal Automated Vehicles Policy](#). The guidance is intended to support stakeholders in the testing and deployment of automated vehicle technologies, providing them with 12 priority safety design elements for consideration.

On October 30, President Trump signed a [memorandum](#) instructing DOT to create a pilot program to test the integration of UAS into national airspace. On November 8, the Federal Aviation Administration (FAA) of DOT [announced](#) the launch of the pilot program, which enables advanced UAS operations in select areas with ongoing safety oversight from the federal government and state or local jurisdictions. Together, these enabling regulations signal a regulatory environment that will better accommodate innovations in the transportation sector.