

2018 Year in Review

Top Ten Regulatory Developments

Just as in [2017](#), regulatory policy continued to be a focal point of 2018 with key actions ranging from proposed rules to one agency's establishment of a new economics office to inform regulatory decisions. While not comprehensive, this *Regulatory Insight* highlights ten important developments related to regulation that occurred in 2018.

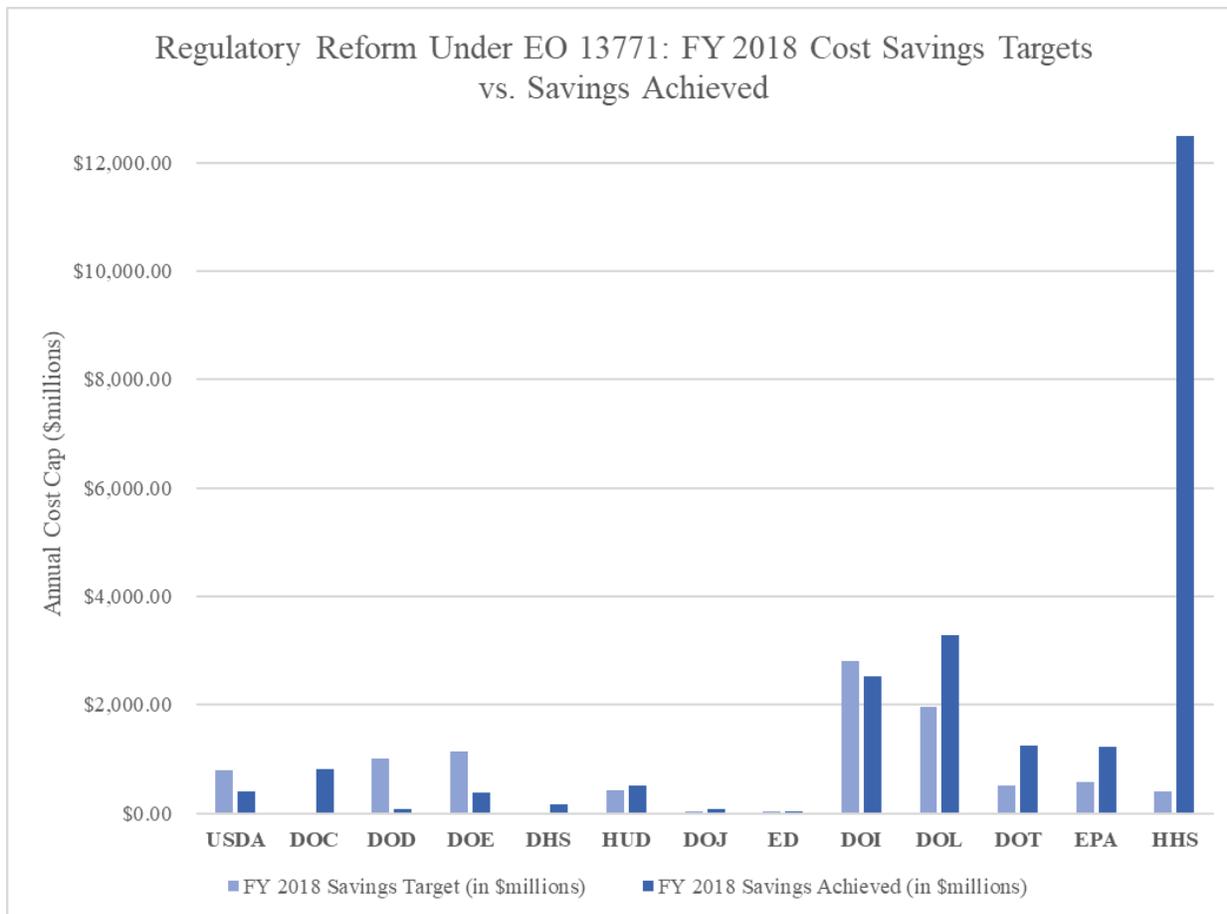
1. Fiscal Year 2018 Regulatory Reform Report

On October 17, the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) released the [2018 Fall Unified Agenda](#), which details the administration's annual Regulatory Plan and its semiannual Unified Agenda of Regulatory and Deregulatory Actions. Along with the Agenda, the administration released a [Regulatory Reform Report](#) on the progress agencies made in implementing Executive Order (E.O.) 13771, which [directed](#) agencies to eliminate two rules for each new rule and required them to offset the costs of new regulations.

While the Agenda has a [long history](#), the Regulatory Reform Report is a specific Trump administration effort to track the cost savings associated with E.O. 13771. The fiscal year (FY) 2017 report estimated that executive branch agencies produced [\\$8.1 billion](#) in present value cost savings from the 67 deregulatory actions and three regulatory actions taken in that time period. The FY 2018 report estimated that agencies saved [\\$23.4 billion](#) in present value costs through 176 deregulatory actions and 14 significant regulatory actions—a 12-to-1 ratio. However, many of the deregulatory actions were not considered “significant” under [E.O. 12866](#), making them [not directly comparable](#) to the significant regulatory actions. A more apples-to-apples comparison of [only significant actions](#) is 57 deregulatory to 14 regulatory actions—yielding a 4-to-1 ratio.

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Source: Daniel R. Pérez, [Fiscal Year 2018 Report on Regulatory Reform under Trump](#)

Further examination [reveals](#) that the Department of Health and Human Services (HHS) was the source of more than half of the FY 2018 present value cost savings—generating [\\$12.5 billion](#) of \$23.4 billion overall. Much of these cost savings came from paperwork reductions, with eight of 12 [deregulatory actions having quantified cost savings](#) relating to the Medicare program. One action that [changed](#) the Medicare home health care rule is [estimated](#) to save 2 million burden hours per year (monetized at [\\$146 million per year](#)).

Looking forward, the administration will continue to track cost savings produced in accordance with E.O. 13771. The Report also included a proposed regulatory budget for FY 2019 of [\\$18 billion](#) in present value cost savings.

2. EPA Process Reforms on Regulatory Science and Benefit-Cost Analysis

In 2018, the U.S. Environmental Protection Agency (EPA) proposed two new rules that would modify the agency’s regulatory process. First, EPA released a request for comment on a rule for “[Strengthening Transparency in Regulatory Science](#),” which clarifies how EPA uses scientific evidence to develop its significant regulations. The proposed rule [states](#) that “for the science

pivotal to its significant regulatory actions, EPA will ensure that the data and models underlying the science is publicly available in a manner sufficient for validation and analysis,” with the [goal](#) being “to increase transparency in the preparation, identification, and use of science in policymaking.”

The proposal has [five main requirements](#), including to (1) clearly identify all science that was relied on to select a regulatory action, (2) ensure the public availability of “dose response data and models” for independent validation, (3) describe and document the assumptions and methods and show the sensitivity of the results to alternative assumptions, (4) explicitly consider high-quality studies that may challenge core methodological assumptions and variables, and (5) conduct independent peer review of pivotal science used to justify regulatory decisions. While the rule has received substantial attention and generated some controversy, it is [not particularly novel](#) but rather “consistent with policies on scientific integrity espoused by previous administrations.” [Public comments](#) will be important to evaluate as the administration assesses issues such as the risk of compromising individual privacy.

Second, EPA released an advance notice of proposed rulemaking (ANPRM) on “[Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process](#).” The ANPRM does not propose any restrictions, but rather solicits comment on whether and how EPA should promulgate regulations to create a framework for consistent and transparent benefit-cost analysis.

GW professors submitted public comments to the agency and raised key issues related to the ANPRM. Susan Dudley [focused](#) in particular on the “[perceived inconsistency and lack of transparency](#)” in EPA’s benefit-cost analysis, and she delineated the core elements that underpin a consistent and transparent regulatory impact analysis (RIA). Joseph Cordes [provided](#) input on “the specific issue of which stakeholders should receive standing in benefit-cost analysis,” and he commented on “the inclusion of indirect effects, also referred to as co-benefits, in benefit-cost calculations.” Brian Mannix [considered](#) the implications (including judicial enforcement) of EPA conducting a rulemaking rather than continuing to rely on internal guidelines, and he looked at the alternative of having OIRA issue a rule that applied more broadly than just EPA.

3. Repeals, Revisions, and Modifications to Environmental Regulations

This year, the Trump administration also took substantial actions to repeal, revise, and replace environmental regulations. First, EPA [published](#) the proposed Affordable Clean Energy (ACE) rule on August 31, and [reopened](#) the comment period for the [repeal of the Clean Power Plan](#) (CPP), which regulates carbon dioxide (CO₂) emissions from existing power plants. EPA’s [proposed rule](#) from August includes three actions: (1) to replace the CPP with the ACE rule; (2) to “provide direction to both EPA and the states on the implementation of emission guidelines” for current and future actions under section 111(d) of the Clean Air Act; and (3) to revise the

New Source Review program. Brian Mannix’s [public interest comment](#) explains in detail the recent history of EPA’s rulemakings and the core analytical issues under consideration.

While the ACE rule deals with existing stationary sources that generate electricity, EPA is also [proposing](#) a revision to the standards for new, modified, and reconstructed stationary sources—referred to as the New Source Performance Standards (NSPS) rule. The proposal, [published](#) in the Federal Register on December 20, includes a number of different actions, but a key focus of the rulemaking is to [amend](#) its previously determined best system of emission reduction (BSER) from “partial carbon capture and storage” to “the most efficient demonstrated steam cycle ... in combination with the best operating practices.”

A third potential change to environmental regulations by EPA and the National Highway Traffic Safety Administration (NHTSA) was the proposed “Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks,” [published](#) in the Federal Register on August 24. The SAFE rule would amend the existing Corporate Average Fuel Economy (CAFE) standards and CO₂ emissions standards by [freezing](#) them at the Model Year (MY) 2020 level through MY 2026. The proposed changes are informed by new information and analyses, which include a revision of NHTSA’s accounting of [two consumer responses](#) to the standards: the *Rebound Effect*, and the *Scrappage—or Gruenspecht—Effect*. After incorporating the revised estimates to the rebound and scrappage effects into the analysis, the agencies concluded that while the proposed rule would [produce minimal](#) environmental effects, it would [prevent](#) nearly 13,000 on-road fatalities.

Finally, EPA and the Department of the Army (Army) continued their efforts to repeal and revise the definition of the “[waters of the United States](#)” (WOTUS). The Trump administration is seeking to [reinstate the preexisting definition](#) of WOTUS before 2015, and to achieve this goal, EPA and Army took action in 2018 on the two-step rulemaking process. Related to step one ([repeal](#)), the agencies published a [supplemental notice of proposed rulemaking](#) in the Federal Register on July 12 “to clarify, supplement and seek additional comment on an earlier proposal” from July 2017. The agencies also advanced with step two ([revise](#)) in 2018, releasing a [proposal](#) for a revised definition of WOTUS on December 11. The proposal [seeks](#) to “clarify[y] federal authority under the Clean Water Act” and “clearly defin[e] the difference between federally protected waterways and state protected waterways.” The proposal has not yet been published in the Federal Register; once it is, the agencies will take comment on the proposed rule for 60 days.

4. Creation of the Office of Economics and Analytics at the FCC

In 2018, the Federal Communications Commission (FCC) established an [Office of Economics and Analytics](#), which [reorganized](#) economists, data professionals, and lawyers from across the Commission into a central office to perform economic analysis to inform rulemaking and other Commission decisions. The initiative also elevated the role of economic analysis in the FCC’s

rulemaking process, [rewriting](#) procedures to incorporate a benefit-cost analysis for each new rule with an annual effect on the economy of at least \$100 million.

Chairman Ajit Pai [announced](#) the initiative in April 2017, and on January 30, 2018, the Commission [adopted](#) an order to establish the Office. Throughout the year, agency officials [consulted](#) with OMB, congressional appropriations committees, and the FCC employees' labor union. On [October 25](#), the Commission received final approvals to establish the Office, and the action was published in the Federal Register with an effective date of [December 7](#). On [December 11](#), the new Office opened with [four divisions](#): (1) the Economic Analysis Division, (2) the Industry Analysis Division, (3) the Auctions Division, and (4) the Data Division.

The FCC's efforts are part of a broader push to incorporate economic analysis into rulemakings from independent agencies. The [idea](#) to subject rules from independent agencies to the "same economic analysis standards and review procedures as regulations from executive branch agencies" has bipartisan support in Congress and from experts, including multiple past and present [OIRA administrators](#). Other agencies, such as the U.S. Securities and Exchange Commission, have previously [undertaken similar efforts](#) to adhere to the analytical principles of E.O. 12866.

5. Final Restoring Internet Freedom Order

A major FCC deregulatory action was the [release](#) of its "Restoring Internet Freedom" Order on January 4, 2018 after it was adopted in [December 2017](#). The final rule was [published](#) in the Federal Register in February with an effective date of April 23, and a final rule notifying the public of OMB approval of information collection associated with the Order was published with an effective date of [June 11](#).

According to the Commission, the core purpose of the Order was to undo actions taken by the FCC under the Obama administration through the 2015 Open Internet Order by [restoring](#) the agency's previous "light-touch regulatory scheme." The FCC's [action](#) includes three main components—a Declaratory Ruling, a Report and Order, and an Order—that reinstate the regulatory approach that existed prior to 2015 and require Internet Service Providers to disclose information about certain practices in an attempt to increase transparency. The [Order](#) relies on transparency, consumer protection regulation, and antitrust enforcement to preserve Internet openness.

Notably, the Order is an example of how [better economic analysis](#) can inform regulatory decisions, even though it was finalized before the official creation of the Office of Economics and Analytics. An [article](#) by GW Regulatory Studies Center research professor Jerry Ellig, who served as the FCC's chief economist from July 2017–July 2018, explains the key actions of the rulemaking and walks through the economic analysis that underlies the Commission's decisions

“on blocking and throttling, paid prioritization, general conduct, and reclassification of broadband as an information service rather than telecommunications.”

6. Memorandum Making Tax Regulations Subject to OIRA Review

On April 11, the Department of the Treasury (Treasury) and OMB signed a [Memorandum of Agreement](#) (MOA), as directed by [E.O. 13789](#), providing that tax regulations will be subject to review by OIRA under [E.O. 12866](#). Although OIRA reviews all significant regulations from executive branch agencies, tax regulations had been [exempt](#) from review since 1983. The exemption [led to](#) the issuance of Treasury regulations that would produce large policy impacts with little evaluation or scrutiny. The MOA is an important step toward [ensuring](#) more “well-reasoned and cost-effective” tax regulations.

The MOA indicates that all significant tax regulatory actions will be subject to the analytical requirements of E.O. 12866, and Treasury will conduct an RIA of the anticipated benefits and costs of regulations expected to have an annual non-revenue effect on the economy of \$100 million or more. Treasury has 12 months from the date of the MOA to obtain “reasonably sufficient resources” to conduct full RIAs. A [public interest comment](#) on a controversial tax credit regulation by research professor Jerry Ellig illustrates how current IRS practice often neglects to answer key questions agencies are supposed to address in an RIA.

7. Proposed Revisions of Offshore Oil and Gas Drilling Regulations

On May 11, the Bureau of Safety and Environmental Enforcement (BSEE) of the Department of Interior [proposed](#) to revise existing regulations pertaining to offshore oil and gas drilling. The proposed revisions would modify and remove various provisions of the Blowout Preventer Systems and Well Control final rule [published](#) on April 29, 2016. The 2016 final rule was issued to implement multiple recommendations resulting from various investigations of the [Deepwater Horizon incident](#). The 2016 rule consolidated the equipment and operational requirements for well control; enhanced blowout preventer, well design, and modified well-control requirements; and incorporated certain industry technical standards. Most of the requirements became effective on July 28, 2016.

On March 28, 2017, President Trump issued [E.O. 13783](#) on Promoting Energy Independence and Economic Growth, directing federal agencies to review existing regulations and suspend, revise, or rescind those that unduly burden the development of domestic energy resources. Further, on April 28, 2017, the President issued [E.O. 13795](#) to direct the Secretary of the Interior to review and revise the 2016 well control rule to encourage energy exploration and production while ensuring that such activity is safe and environmentally responsible. In response to the orders, BSEE reviewed the 2016 final rule and identified certain provisions that, according to the agency’s estimates, impose undue burdens on oil and natural gas operators but do not

significantly enhance worker safety or environmental protection. The May 11, 2018 action proposed to amend, revise, or remove these provisions. According to BSEE's [estimates](#), the proposed revisions would save the oil and gas industry an annualized compliance cost of \$95 million over the proposed rule's 10-year timeframe, while not negatively affecting worker safety and the environment.

8. Proposed Revisions of Higher Education Regulations

This year, the Department of Education (ED) proposed to revise two sets of regulations implementing the Higher Education Act of 1965, as amended (HEA).

On July 31, ED issued a [proposed rule](#) to establish a Federal standard for evaluating and a process for adjudicating whether a student loan borrower can receive loan forgiveness under a “defense to repayment” based on an act or omission of a school. It would revise the borrower defense rule [finalized](#) on November 1, 2016 which would otherwise take effect on July 1, 2019. Section 455(h) of the HEA authorizes ED to promulgate regulations allowing a student loan borrower to assert a defense to repayment of a Federal Direct Loan based on acts or omissions of an institution of higher education. The currently effective borrower defense regulations, [promulgated](#) in 1994, were rarely used prior to 2015. They reflect ED's original interpretation of the statute that borrowers are allowed to raise defenses to repayment only in response to a proceeding by the Department to collect on a Direct Loan. In 2015, in response to the closure of Corinthian Colleges, Inc., ED [announced](#) a streamlined process to accept borrowers' defenses to repayment based on affirmative claims against their institution—that is, borrowers may seek loan forgiveness if they believe they were defrauded by their institution. Since then, ED had received more than 130,000 defense claims. The 2016 final rule was intended to officially notify the public of this new interpretation and establish a Federal standard and a process for adjudicating the claims, but it never took effect due to several [delays](#) of its effective date.

In the July 31 proposed rule, ED states that a process that allows borrowers to submit affirmative claims “could potentially create improper incentives for borrowers with unsubstantiated allegations against schools to seek loan discharges.” Hence, the Department reconsiders whether to allow only defensive claims in collection proceedings or to continue the approach taken in its 2015 interpretation to accept both defensive and affirmative claims. In the latter case, it would implement appropriate provisions to protect institutions and taxpayers against frivolous claims and enable institutions to respond to borrower claims. This new standard and other proposed revisions would apply to loans first distributed after July 1, 2019. A public interest comment submitted by senior policy analyst Daniel R. Pérez [provides](#) insights on the significant changes in ED's proposed rule.

A related ED [proposal](#) this year would rescind the gainful employment regulations [promulgated](#) in 2014. That rule established measures for determining whether a postsecondary educational

program prepares students for gainful employment in a recognized occupation, and the conditions under which the program remains eligible for participation in the Federal Student Aid programs authorized by title IV of the HEA. Specifically, the 2014 gainful employment regulations established a methodology for calculating mean debt-to-earnings (D/E) rates for educational programs and specified a range of acceptable D/E rates programs must maintain to retain title IV eligibility. On August 14, 2018, ED proposed to rescind the 2014 rule, challenging the accuracy and validity of the D/E rates and determining that its disclosure requirements are more burdensome than previously anticipated.

9. Bump-Stock-Type Devices

On December 26, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) of the Department of Justice (DOJ) [finalized](#) an amendment to its regulations to clarify that bump-stock-type devices—devices that could convert an otherwise semiautomatic firearm into a nearly automatic firearm—are “machineguns” as defined by the National Firearms Act of 1934 (NFA) and the Gun Control Act of 1968 (GCA). Consequently, it will prohibit any person from transferring or possessing a bump-stock-type device. Current possessors of these devices will be required to destroy the devices or abandon them at an ATF office prior to the effective date of March 26, 2019.

The rule is in response to the intensive public attention focused on bump-stock-type devices in the wake of the deadly mass shooting committed by a shooter firing AR-type rifles affixed with a bump-stock device at a Las Vegas music festival in October 2017. On December 26, 2017, ATF [published](#) an ANPRM, inviting public comments on the nature and scope of the market for these devices. Following another deadly shooting in a Florida high school in February 2018, President Trump [directed](#) DOJ to propose regulations that would ban bump stocks. Subsequently, ATF issued a [proposed rule](#) on March 29 to clarify the statutory terms “single function of the trigger” and “automatically,” and amend the regulatory definition of “machinegun” to include bump-stock-type devices. After reviewing over 186,000 comments received for the proposed rule and clearing all [the fundamental steps](#) in the regulatory process, ATF finalized the rule on December 26.

10. National Bioengineered Food Disclosure Standard

On December 21, the Agricultural Marketing Service (AMS) of the Department of Agriculture [finalized](#) a rule to establish a national mandatory bioengineered (BE) food disclosure standard (NBFDS). The standard requires food manufacturers, importers, and other entities that label foods for retail sale to disclose information about BE foods and foods containing BE ingredients. The disclosure requirement is intended to provide consumers with uniform information on human foods that are or may be bioengineered. The implementation date of the standard is January 1, 2021 for small food manufacturers and January 1, 2020 for all other regulated entities.

Regulated entities are required to “begin implementing the NBFDS no later than those dates by identifying the foods that will need to bear a BE disclosure, the records necessary to meet the recordkeeping requirements, and the type of BE disclosure they will use on their products.” Mandatory compliance is not required until January 1, 2022, but regulated entities may voluntarily comply with the standard until December 31, 2021.

The NBFDS is the first nationwide mandatory labeling requirement for BE foods in the United States. Information about foods produced using genetic engineering has only been provided through voluntary labeling, following [guidance](#) from the Food and Drug Administration. Although many states had attempted to adopt some form of mandatory biotech labeling initiatives, Vermont was the only state that had successfully passed mandatory labeling legislation unconditional on other states’ passage of legislation. To fulfill consumer demand for marketing information about BE foods and to realize more cost-efficient, uniform labeling of BE foods across the country, Congress passed the National Bioengineered Food Disclosure Law in July 2016, which made possible a national mandatory BE food labeling regulation. After [seeking](#) input from stakeholders on directed questions related to the standard, AMS [issued](#) the notice of proposed rulemaking on May 4, 2018.