

2022 Regulatory Year in Review

Ten Important Regulatory Developments

Mark Febrizio & Zhoudan Xie | January 25, 2023

Introduction

This *Regulatory Insight* recaps ten important regulatory developments that occurred in 2022. In contrast to previous reviews for [2020](#) and [2021](#), regulatory responses to the COVID-19 pandemic received less emphasis than other policy areas in 2022. While the Biden administration continued its efforts to undo Trump-era regulations during its second year, it also broke new ground in several policy areas and sought to address emerging issues in the regulatory sphere.

1. Pursuing Equity and Nondiscrimination

Starting from the first day of the Biden administration, [advancing equity](#)—particularly for racial minorities—has been a [stated priority](#) for the federal government and in the [regulatory sphere](#). In 2022, federal agencies continued work on policies related to equity, including actions focused on nondiscrimination and environmental justice.

First, the Biden administration furthered policies on nondiscrimination related to gender identity and sexual orientation. In June, President Biden issued Executive Order 14075, which stated the administration’s [policy](#) to “combat unlawful discrimination and eliminate disparities that harm LGBTQI+ individuals and their families.” The order contained specific policy directives to several agencies with deadlines ranging from 30 to 200 days.

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Separately, federal agencies undertook regulatory actions that contrasted with Trump-era policies. In July, the Department of Education [proposed](#) revisions to its Title IX regulations preventing discrimination on the basis of sex, gender identity, or sexual orientation. The latter two categories were previously not directly addressed by the department's regulations, although [agency guidance](#) prohibited such harassment in practice. In part, this proposal would amend [finalized changes](#) made during the Trump administration. In August, the Department of Health and Human Services (HHS) [proposed](#) regulations implementing the nondiscrimination requirements of Section 1557 of the Affordable Care Act, which also would [revise](#) a 2020 rule finalized under President Trump. The 2022 proposal contains provisions to prohibit discrimination on the basis of gender identity and sexual orientation.

Second, the Biden administration took actions to promote pay equity and nondiscrimination protections in the federal workforce. [Executive Order 14069](#) of March 15 focused on “enhancing pay equity and transparency for job applicants and employees of federal contractors and subcontractors,” [building off](#) a 2021 executive order on diversity, equity, inclusion, and accessibility for federal employees. Also, at the beginning of 2022, the Office of Personnel Management [proposed](#) a rule to implement the Elijah E. Cummings Federal Employee Antidiscrimination Act of 2020. Then, the Department of Transportation (DOT) [issued](#) a notice to implement the Act in December.

Third, federal regulators took a series of actions aimed at [environmental justice](#) in 2022. These were predominantly focused on soliciting feedback from the public and developing practices to better understand the disproportionate environmental impacts imposed on disadvantaged communities. For instance, HHS [issued](#) a request for information on its 2022 Environmental Justice Strategy and Implementation Plan in April and [established](#) an Office of Environmental Justice within the department. The Environmental Protection Agency (EPA) organized public meetings on regulatory proposals it was developing for [Lead and Copper Rule Improvements](#) and [Per- and Polyfluoroalkyl Substances](#) (PFAS) water standards. The Council on Environmental Quality (CEQ) also sought feedback on a [screening tool](#) to identify environmental justice communities and a [scorecard](#) to assess federal efforts related to environmental justice.

2. Tightening Standards for Greenhouse Gas Emissions

Consistent with the Biden administration's climate agenda, federal agencies took steps to tighten standards for greenhouse gas (GHG) emissions in 2022. In general, these actions fall under either attempts to measure and report on the extent of emissions or substantive requirements that would reduce emissions. Under the first category, EPA proposed revisions to its GHG reporting regulations that would “improve the quality and consistency of the data collected” and simplify implementation. The Fall 2022 Unified Agenda [suggests](#) that EPA may supplement its proposal in Spring 2023. Additionally, the Federal Highway Administration within DOT [proposed](#) a rule to

assess the performance of the National Highway System—particularly in terms of CO₂ emissions by vehicles.

Federal fuel economy standards would fall under the second category (substantive requirements). Both DOT and EPA have a hand in controlling emissions from on-road vehicles. For instance, the National Highway Traffic Safety Administration (NHTSA) [finalized](#) a rule revising Corporate Average Fuel Economy (CAFE) standards for passenger cars and light trucks; this action revisited the Safer Affordable Fuel Efficient (SAFE) Vehicles Rule established under President Trump, which we highlighted in previous annual reviews ([2020](#); [2021](#)). In addition, NHTSA [announced](#) it is working on an environmental impact statement for these standards and [issued](#) a proposal to revise fuel efficiency test procedures for heavy-duty vehicles. Relatedly, EPA took steps on fuel economy standards in 2022, issuing a [proposal](#) updating emissions standards for heavy-duty vehicles in March and then [finalizing](#) the rule in December. Notably, regulating GHGs is only one component of those standards, which also address pollutants that create ozone and particulate matter.

Other substantive actions taken by federal agencies include regulating GHG emissions from stationary sources (such as power plants). In addition to limiting CO₂, reducing methane emissions features prominently in these rules. EPA [issued](#) a supplemental proposal to reduce methane emissions from crude oil and natural gas sources, including sources not part of the prior proposal from 2021. The Bureau of Land Management also [proposed](#) regulations to reduce methane emissions caused by venting, flaring, and leaks when drilling for natural gas and oil.

3. Tightening Standards for Other Emissions

Stricter regulations that target one type of emissions often have consequences for other emissions too. As noted previously, emissions standards for new motor vehicles (e.g., EPA’s [rule](#) for heavy-duty vehicles), reduce both GHGs and other pollutants like those that contribute to ozone and particulate matter. Focusing on a non-stationary source, EPA proposed two actions in 2022 seeking to reduce [particulate matter](#) and [lead emissions](#) coming from aircraft engines.

EPA also took several actions to modify the National Emission Standards for Hazardous Air Pollutants (NESHAP), which include emissions of pollutants like mercury. A January proposal on primary copper smelters [found](#) the “risks from emissions of air toxics from this major source category are unacceptable.” A February proposal [determined](#) that “it remains appropriate and necessary to regulate [hazardous air pollutant] emissions from EGUs after considering cost”—another reversal of a Trump-era regulation that reconsidered an Obama-era regulatory decision. In addition to these proposals, EPA finalized revisions to NESHAP regulations in 2022, such as a residual risk and technology review for [Mercury Cell Chlor-Alkali Plants](#) and [amendments](#) to standards for new and existing industrial, commercial, and institutional boilers and process heaters.

4. Water-Related Environmental Regulations

While the prior environmental regulations discussed focus on air pollution, the Biden administration also made efforts to revise regulations for water quality. Incidentally, these actions coincided with the [50th anniversary](#) of the Clean Water Act of 1972.

The regulations defining “waters of the United States” (WOTUS) have been a major environmental policy focus during Biden’s presidency—just as they were under the previous two administrations. We highlighted EPA’s proposed changes to WOTUS in [2021](#), which would restore the pre-2015 definition and serve as a foundation for further rulemaking. On December 30, 2022, EPA [announced](#) that it had finalized the rule defining WOTUS based on the pre-2015 framework. The final rule was [officially published](#) in the Federal Register in January 2023 and will become effective in March.

EPA’s announcement followed legal battles surrounding application of the WOTUS rule, including a high-profile [Supreme Court case](#). A second court decision [focused](#) on another regulation stemming from the Clean Water Act, namely the Section 401 requirements focused on water quality certification. During the Trump administration, EPA [promulgated](#) a rule in 2020 that updated substantive and procedural requirements for water quality certification actions under the Clean Water Act. In 2022, EPA reconsidered the 2020 rule and [issued](#) revisions consistent with President Biden’s [Executive Order 13990](#), “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.”

In contrast with the Clean Water Act rules based on a long history of implementation, EPA also continued work on an emerging regulatory area in 2022—national standards for [PFAS](#). For instance, EPA issued [health advisories](#) for four types of PFAS in June. Later in the summer, the agency [announced](#) that five types of PFAS would be subject to toxic chemical release reporting (in December, the agency [updated](#) reporting requirements for PFAS included on the Toxics Release Inventory). [Throughout](#) the [year](#), EPA also removed PFAS chemicals from the list of inert ingredients approved for use in pesticides. In a major substantive regulatory change, EPA designated perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) as hazardous substances, making them eligible for “Superfund” cleanups.

EPA was not the only agency that dealt with PFAS-related issues in 2022. The White House’s Office of Science and Technology Policy (OSTP) [released](#) a request for information designed to inform the PFAS Strategic Plan and guide an interagency team on PFAS.

5. Climate-Related Financial Risk Management

Another notable theme for 2022 relates to how environmental conditions, particularly climate change, are affecting financial risk. In response, federal agencies—both executive branch and independent regulators—took steps to understand financial risk from climate change.

Executive agencies fall under the control of the president and are generally considered to be [distinct](#) from [independent agencies](#). For instance, among executive agencies, the Department of Labor (DOL) [sought](#) public input on how climate-related financial risk could affect pensions and retirement savings and how the agency might address these threats. In response to [Executive Order 14030](#) of 2021, the Defense Department, General Services Administration, and National Aeronautics and Space Administration jointly [proposed](#) a rulemaking to amend the Federal Acquisition Regulation to require contractors to disclose their GHG emissions and climate-related financial risk.

Additionally, President Biden [issued](#) an executive order in March on mitigating risks related to distributed ledger technology and digital assets, such as Bitcoin and other cryptocurrencies. As part of the order, the president [directed](#) the Director of OSTP to report on the connections between distributed ledger technology and efforts to address climate change (e.g., implications for energy usage). Later that month, OSTP [published](#) a request for information to [seeking](#) “comments on the protocols, hardware, resources, economics, and other factors that shape the energy use and climate impacts of all types of digital assets.” In September, the office publicly [released](#) its report on climate implications of digital assets, which detailed the energy intensity of digital assets and the potential for digital assets to support climate monitoring or mitigation.

Because many financial regulators in the US are independent agencies, much of the action in 2022 on climate-related financial risk stemmed from their policies. In April, the Federal Deposit Insurance Corporation [shared](#) draft principles for ensuring “safe and sound management of exposures to climate-related financial risks” for the largest financial institutions (over \$100 billion in total consolidated assets). The Federal Reserve System also [issued](#) a request for information on similar [draft principles](#) that would “support efforts by large financial institutions to focus on key aspects of climate-related financial risk management.”

Later in April, the Securities and Exchange Commission (SEC) [proposed](#) amendments that would expand and standardize climate-related disclosures for investors, such as mandating that registration statements and annual reports include certain climate-related information. Then in June, the Commodity Futures Trading Commission [sought](#) input on how climate-related financial risk pertains to derivatives markets and underlying commodities markets.

6. Attempted Student Loan Forgiveness

In 2022, the Biden administration took [several steps](#) for student loan debt relief. On August 26, the administration announced plans to provide a one-time debt relief to borrowers with loans held by the Department of Education. Borrowers would get \$10,000-\$20,000 in debt relief if they have [eligible](#) federal student loans and meet the income requirements. The White House [estimates](#) that up to 43 million low- and middle-income borrowers would receive the relief.

However, this blanket loan forgiveness program received massive criticism and legal challenges, with opponents [arguing](#) that it contributes nothing to lowering the cost of higher education and increases burden for general taxpayers. Although the administration defends the program by [citing](#) its authority to cancel student debt during the COVID-19 pandemic under the Higher Education Relief Opportunities for Students (HEROES) Act of 2003, courts have issued orders blocking the program. The Department of Justice [filed](#) an emergency application in November asking the Supreme Court to lift the injunction against the program. On December 1, the Supreme Court [agreed](#) to hear arguments about the case in February 2023, meaning that the implementation of the program will remain blocked until then.

In response to the court orders, the administration further extended the student loan payment pause, which started in March 2020 as part of the COVID-19 emergency relief. The pause will be [extended](#) until “the Department of Education is permitted to implement the debt relief program or the litigation is resolved.”

In addition to the one-time debt relief program, the administration also made changes to other student loan forgiveness programs. For example, the Department of Education [announced](#) in April a one-time adjustment to eligible income-driven repayment (IDR) accounts to count more time toward forgiveness. In October, the department introduced plans to revamp the Public Service Loan Forgiveness (PSLF) program, including [providing](#) a limited waiver to allow all payments by student borrowers to count toward PSLF, regardless of the loan program. In a November [rule](#), the Department issued regulations on the implementation of various other program changes, such as establishing a framework for borrowers to raise a defense to repayment, providing a discharge to borrowers with a total and permanent disability, and expanding definitions for full-time employment, qualifying employers, and qualifying monthly payments for PSLF. These regulations are effective July 1, 2023.

7. Developments in Labor Regulations

There were several major developments in labor regulations during the past year, reflecting the Biden administration’s approach to reversing Trump-era rules. An important regulatory action is DOL’s October [proposal](#) on the classification of a worker’s status as an employee or independent

contractor. The proposed rule would rescind the 2021 [Independent Contractor rule](#) and replace it with detailed regulations addressing the multifactor economic reality test that guides the inquiry into a worker's status as an employee or independent contractor under the Fair Labor Standards Act (FLSA). The proposal has significant implications for businesses and workers in multiple industries including gig companies (e.g., Uber and Lyft), construction, trucking, and other sectors that use independent contractors. If workers are classified as employees rather than independent contractors, their employers are required to provide them certain benefits and protections, such as a minimum wage, overtime, social security taxes, and contributions to unemployment insurance. Stakeholders have expressed concern that the changes would [increase](#) businesses' operating costs substantially and [hinder](#) worker freedom. The proposed rule [received](#) over 55,000 comments on Regulations.gov by the comment deadline.

In addition to the worker classification rule, the administration moved to rescind several other Trump-era rules governing the labor market. One is DOL's [final action](#) in September to rescind a [2020 regulation](#) that established a process under which DOL was authorized to grant recognition to qualified third-party entities, which in turn were authorized to evaluate and extend recognition to Industry-Recognized Apprenticeship Programs.

Also in September, the National Labor Relations Board (NLRB) issued a [proposal](#) to rescind and replace its [2020 rule](#) on joint employer status. The proposed rule would revise the standard for determining whether two employers are joint employers of particular employees under the National Labor Relations Act. Relatedly, NLRB [proposed](#) to rescind and replace the amendments issued in April 2020 to its regulations governing the filing and processing of petitions for a Board-conducted representation election. NLRB plans to finalize [both actions](#) in August 2023.

Several other regulatory actions reflect the administration's priority on worker health and safety. In March, the Occupational Safety and Health Administration (OSHA) issued a [proposed rule](#) to amend the occupational injury and illness recordkeeping requirements. Employers are required to keep records of injuries and illnesses under the current recordkeeping regulation, and the proposal would require certain employers to electronically submit the information to OSHA on an annual basis. In June, OSHA [published](#) an advance notice of proposed rulemaking (ANPRM) to seek input on revising its standards for occupational exposure to lead. Through the rulemaking, OSHA intends to lower the current blood lead levels that trigger medical removal and return to work status to reduce the risk of adverse health effects from occupational lead exposure. OSHA's plan to lower blood lead levels can be traced back to the [Spring 2016 Unified Agenda](#), but the timeline for further actions is still unclear.

8. Continued Efforts to Revamp Immigration Policies

In the [2021 review](#), we highlighted how the Biden administration filled its initial year with efforts to halt or undo many Trump-era immigration policies. In 2022, the administration continued some of those efforts and issued a series of rulemaking actions to implement its own policy agenda on immigration.

The actions to reverse the [2019 Public Charge rule](#) continued last year. Following the [ANPRM](#) released in August 2021, the Department of Homeland Security (DHS) [issued](#) a proposed rule in February 2022 and [finalized](#) the action in September. Effective December 23, 2022, the rule implements a different policy than the 2019 rule in determining whether noncitizens are inadmissible to the U.S. because they are likely at any time to become a public charge. DHS will [no longer](#) generally consider a noncitizen's reliance on or receipt of non-cash benefits such as food stamps and Medicaid in its determination of a public charge, which were factors under the 2019 rule. In that sense, the current rule [narrows](#) the definition of a public charge.

DHS also [finalized](#) its 2021 proposal to preserve and fortify the Deferred Action for Childhood Arrivals (DACA) policy, which defers removal of certain noncitizens who came to the U.S. years earlier as children. DHS took the action in response to the [prior attempts](#) to terminate the DACA policy under the Trump administration. Further, DHS [rescinded](#) a 2019 notice which expanded the application of expedited removal procedures to noncitizens not already covered by previous designations.

Another set of actions provides more flexibilities with respect to employment authorization and temporary workers. First, DHS temporarily [increased](#) the automatic extension period applicable to expiring Employment Authorization Documents (EADs) for certain renewal applicants from 180 days to 540 days from the EAD expiration date. Second, DHS [proposed](#) to allow employers optional alternatives for examining the documentation presented by individuals seeking to establish identity and employment authorization for purposes of completing the Form I-9. Third, DOL [amended](#) its regulations governing the certification of agricultural labor or services to be performed by temporary H-2A nonimmigrant workers, which is intended to strengthen protections for workers and simplify the H-2A application and temporary labor certification process.

9. Regulatory Approaches to Increasing Healthcare Access

Health-related rulemaking activities in 2022 focused less on COVID-related regulations but continued aiming at increasing healthcare access. As the world is entering a post-pandemic era, the past year saw a substantial decrease in regulatory actions directly combating COVID-19. In early 2022, the Centers for Disease Control and Prevention (CDC) lifted several travel restrictions related to COVID-19. For example, CDC [terminated prior](#) orders suspending the right to introduce

certain persons from countries where a quarantinable communicable disease exists. In June, CDC further [announced](#) that air passengers traveling to the U.S. from a foreign country are no longer required to present a negative COVID-19 test result or documentation of recovery from COVID-19 before boarding a flight. Some agencies issued or are considering issuing extended waivers of certain regulatory requirements that were taken during the earlier phase of the pandemic, such as those related to [asylum interviews](#), [international fisheries](#), [home confinement](#), and [commercial motor vehicle operations](#).

As we highlighted in the 2021 review, the Substance Abuse and Mental Health Services Administration (SAMHSA) within HHS plans to make permanent some regulatory flexibilities for opioid treatment programs granted under the COVID-19 public health emergency, and it published the proposed rule in December 2022. Experts [argue](#) that these flexibilities have increased patient access to critical medications for the treatment of opioid use disorder.

The Food and Drug Administration (FDA) issued several actions governing the supply and use of drug products and medical devices. In February, FDA [proposed](#) to establish national standards for the licensing of prescription drug wholesale distributors and third-party logistics providers, but it is not [planning](#) to finalize the action until 2025. In June, FDA [issued](#) another proposal intended to broaden the types of nonprescription drug products available to consumers. The proposed rule would establish requirements for a [drug product](#) “that could be marketed without a prescription if an applicant implements an additional condition to ensure appropriate self-selection or appropriate actual use, or both, by consumers without the supervision of a healthcare practitioner.” Relatedly, FDA [finalized](#) an action in August updating the regulatory framework for over-the-counter (OTC) hearing aids, aiming at providing reasonable assurance of safety and effectiveness for those devices and fostering access to hearing aid technology.

In addition, agencies took further actions implementing the No Surprises Act, which was enacted as part of the Consolidated Appropriations Act, 2021. In August, the Department of the Treasury, DOL, and HHS [finalized](#) certain requirements related to the disclosure and consideration of information about medical bills under [previously issued](#) interim final rules. The three departments and the Office of Personnel Management are also [considering](#) rulemaking to implement advanced explanation of benefits and good faith estimate requirements of the No Surprises Act.

10. Emerging Areas for Regulators

Although many of the regulatory themes reflect continued efforts in areas that federal agencies have worked on for years, recent technology and innovation posed new challenges for regulators in 2022.

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As digital technology and electronic communications have changed the ways in which many industries operate, regulators took actions to increase oversight of cybersecurity in related industries. In March, SEC issued two [proposed rules](#) to impose disclosure and recordkeeping requirements related to cybersecurity risks and cybersecurity incidents on certain investment advisers and companies. The Transportation Security Administration [published](#) an ANPRM to seek input on ways to strengthen cybersecurity and resiliency in the pipeline and rail sectors. NHTSA also [released](#) guidance to support sound, risk-based cybersecurity management processes in the automotive industry.

Digital transformation is not only occurring in regulated industries but also within [agencies](#). Since 2019, FDA has [developed](#) several plans for technology and data modernization to advance its mission, including modernizing its technical infrastructure and operations, enhancing its capabilities to develop technology products, and facilitating communication and collaboration with external stakeholders. The latest [Cybersecurity Modernization Action Plan](#) specifically targets the agency's cybersecurity capabilities and risk management technologies.

Another emerging area that attracted a large amount of discussion last year is the potential regulatory oversight of cryptocurrencies. Currently cryptocurrency transactions are not subject to regulations applicable to other financial markets. However, the rapid [expansion](#) of the crypto industry during recent years has led to calls for appropriate regulatory oversight. In March, President Biden [issued](#) an executive order on Ensuring Responsible Development of Digital Assets, directing federal agencies “to consider the extent to which investor and market protection measures within their respective jurisdictions may be used to address the risks of digital assets and whether additional measures may be needed.” Pursuant to the executive order, agencies [developed](#) reports with policy recommendations. Among them, the Department of the Treasury [published](#) a report in September that reviews the current crypto-asset markets and recommends that “relevant agencies adopt a multi-part approach to address relevant risks associated with the crypto-asset sector using their existing authorities.” Despite these movements, there is [no consensus](#) on specific approaches to regulating cryptocurrencies. How to create a regulatory framework for crypto and digital assets broadly will continue to be a central topic for debate in the coming years.

Conclusion

Although we highlight ten important regulatory themes in this review, this is not an exhaustive list of noteworthy regulatory developments from 2022. Other important rulemaking activities fall outside of these ten themes, and policy developments occur in channels besides notice-and-comment rulemaking that have significant implications for the administrative state and regulatory practice. Examples include the Federal Trade Commission [expanding the scope](#) of its [antitrust](#) enforcement to [ban](#) certain “unfair methods of competition,” the judiciary's [newfound willingness](#) to challenge agency deference in the interpretation of ambiguous statutes, and the increased

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centralization of regulatory decision-making that [reflects](#) President Biden’s “whole of government” approach.