

2023 Regulatory Year in Review

Ten Important Regulatory Developments

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This *Regulatory Insight* concludes another busy year, making it challenging to narrow down the top ten important regulatory developments. In 2023, the Biden administration took significant steps toward carrying out its “Modernizing Regulatory Review” initiative, starting with substantive changes to the regulatory review process and regulatory analysis. The administration continued prioritizing equity and climate-related issues through federal regulation and issued notable actions on other environmental, labor, and immigration issues, including reversals of Trump-era regulations. New developments in artificial intelligence (AI) filled the past year with debate on how to best account for AI systems in the regulatory sphere. Bank failures led federal agencies to revise banking regulations established in the aftermath of the 2007-09 financial crisis, and new merger guidelines broke from precedent by addressing new dimensions of potential concern arising from mergers.

1. Modernizing Regulatory Review

As directed by President Biden’s day-one [memorandum](#), his administration took significant steps to “modernize regulatory review” in 2023. This entailed a new executive order, guidance, and initiatives that aim to narrow the scope of the regulatory review process, change how regulatory analysis is done, and enhance public participation.

On April 6, President Biden signed [Executive Order 14094](#) “Modernizing Regulatory Review.” While reaffirming the longstanding principles established in [Executive Order 12866](#) and [Executive Order 13563](#), this new executive order amended several key elements in the regulatory review process. First, it [revised](#) section 3(f)(1) of Executive Order 12866 which had set the threshold for

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rules referred to as “economically significant” actions—those with an expected annual effect of more than \$100 million on the economy. Executive Order 14094 raised that threshold to \$200 million, subject to adjustment every three years to account for changes in gross domestic product, and replaced the term “economically significant” with “section 3(f)(1) significant.” It also [amended](#) section 3(f)(4) on rules raising novel legal or policy issues. The revised category implies a narrower definition of significant regulations, as the designation must be “specifically authorized in a timely manner by the Administrator of OIRA in each case.”

Second, Executive Order 14094 [directed](#) the Office of Management and Budget (OMB) to issue revisions to Circular A-4, which had provided guidance on regulatory impact analysis to federal agencies since 2003. Accordingly, OMB released [proposed revisions](#) to Circular A-4 on April 6. After a 75-day comment period and a peer review process, OMB issued a final [updated version](#) of Circular A-4 on November 9. The revised Circular made substantive changes to the [2003 version](#) on various aspects of regulatory analysis. Notably, the revised Circular changes the recommended discount rates from 3 percent and 7 percent to 2 percent, puts more emphasis on the consideration of distributional effects, including recommending the use of weights in distributional analysis, recommends the consideration of the international effects of regulations, and increases focus on behavioral biases as a justification for regulation. [Several Regulatory Studies Center scholars offered](#) comments on the draft circular, and the Center [hosted](#) a public event featuring administrators and senior staff from each of the last five administrations. We published [comparisons](#) delineating notable changes between the 2003 Circular A-4 and the [2023 draft](#) and [the draft and final Circular A-4](#).

Third, Executive Order 14094 also [called](#) on agencies to [improve public engagement](#) in the regulatory process. To that end, OIRA issued [guidance](#) in July on “broadening public participation and community engagement in the regulatory process.” The guidance discussed the challenges the public faces when trying to participate in the regulatory process and the barriers agencies must overcome to engage the public effectively. The guidance also directed agencies to start including opportunities for public engagement in the biannual Unified Agenda, starting as early as the Fall 2023 Unified Agenda. OIRA also directed agencies to reconsider their policies on communication and public outreach, such as those policies concerning *ex parte* communications, particularly in the pre-rule phase. These changes aim to increase access to regulatory decision making earlier in the process, when agencies have more flexibility in setting priorities and selecting among regulatory alternatives.

To complement the Biden administration’s effort to modernize regulatory review, the White House National Science and Technology Council released an [annual report](#) as [part of](#) the Frontiers of Benefit-Cost Analysis initiative on December 14. The report identifies a set of effects in five categories that agencies find difficult to quantify or monetize, including non-fatal health effects, ecosystem service effects, wildfires and extreme weather effects, information and transparency

effects, and public benefit program effects. The report calls for research collaboration and early engagement with researchers and experts to address both data gaps and other obstacles to the quantification and monetization of those effects.

2. Artificial Intelligence

On November 30, 2022, OpenAI [publicly released](#) ChatGPT – an AI chatbot built on a large language model – ushering generative AI technologies and their capabilities into mainstream policy debate. Naturally, 2023 was filled with AI-related developments in the regulatory sphere as policymakers, regulators, and other stakeholders sought to capitalize on and address concerns with AI.

Perhaps most notably, President Biden [issued](#) Executive Order 14110, titled “Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence,” which spanned [36 pages](#) in the Federal Register, covered a wide-range of topics, and directed agencies to take dozens of distinct actions. The executive order outlined eight [guiding principles](#) for agencies to consider when carrying out specific actions, included a lengthy section of 33 [definitions](#), and set out numerous procedural and substantive directives for agencies to follow. The latter include requirements intended to advance AI safety, promote innovation and competition within the AI industry, mitigate discrimination resulting from AI systems, and extend privacy protections. To implement aspects of the order, the president [established](#) the White House Artificial Intelligence Council to coordinate federal agency activities on AI policy.

In addition, OMB released a [proposed memorandum](#) on agency use of AI, in an effort to establish new requirements and provide guidance to federal agencies, including independent regulatory agencies. The memorandum would require agencies to take certain internal measures to promote AI governance, such as designating Chief AI Officers, developing compliance plans, and submitting inventories of AI use cases to OMB to be subsequently shared publicly. The document also sets out minimum practices that agencies must implement to manage risks associated with using AI. OMB [sought](#) public comments on the proposal at the end of 2023.

While these actions lay the groundwork for future policies surrounding AI, much of the actual implementation remains outstanding. A December 2023 [report](#) by the Government Accountability Office assessed 20 agencies’ current and planned AI use cases, finding that most were still in the planning phase. Further, despite taking initial steps to comply with executive order and legal directives, many agencies have not finished implementing their respective AI requirements.

Lastly, 2023 marked a wider recognition of how AI technologies intersect with other policy areas, including national security. For instance, Executive Order 14105 of August 9 sought to address U.S. investments in sensitive technologies that pose national security risks, arguing that the open investment environment within the U.S. [could](#) “accelerate and increase the success of the

development of sensitive technologies and products in countries that develop them to counter United States and allied capabilities.” The order [directed](#) the Treasury Department to issue regulations that “identify categories of notifiable transactions” and “prohibited transactions” for [covered technologies](#), which include AI systems related to “military, intelligence, surveillance, or cyber-enabled capabilities.” The executive order also requires the Treasury Secretary to submit recurring reports to the president and Congress. On August 14, the Treasury Department’s Office of Investment Security [published](#) an advance notice of proposed rulemaking (ANPRM) seeking public input on the implementation of the executive order.

3. Equity

In 2023, the Biden administration continued to prioritize equity through federal regulation. The White House issued two executive orders on racial equity. [Executive Order 14091](#) furthers the equity initiatives introduced in Executive Order 13985 from 2021. [Executive Order 14096](#) establishes a “whole-of-government” approach to advancing environmental justice, requiring agencies to review their policies with regard to environmental justice and to submit environmental justice strategic plans to the Council on Environmental Quality (CEQ).

Agencies emphasized more inclusive interpretations of equity this year. The Department of Education proposed a priority and definition of [“underserved populations”](#) that includes “Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders, and other persons of color.” Both the Department of [Health and Human Services](#) and [Housing and Urban Development](#) (HUD) proposed items that would prohibit funding recipients from discriminating on the basis of disability, under the Rehabilitation Act of 1973. HUD also [proposed a rule](#) that would allow individuals with criminal backgrounds to serve as testers for certain public housing programs.

HUD and the Federal Housing Finance Agency (FHFA) took further actions on equity and affordable housing in 2023. HUD proposed a return to its [Affirmatively Furthering Fair Housing](#) initiative to enforce the Fair Housing Act’s provisions to not only avoid discriminating, but also to take affirmative steps to advance fair housing for underserved communities. HUD also reinstated its [discriminatory effects standard](#), prohibiting any actions with discriminatory effect, regardless of whether actors intend to discriminate. The FHFA proposed additional requirements that would improve [fair lending and fair housing](#) practices, and improve FHFA’s oversight of organizations like Fannie Mae and Freddie Mac.

4. Regulating GHG Emissions

The Biden administration continued actively regulating greenhouse gas (GHG) emissions in the face of climate change. Over the past year, there were two broad categories of actions: measuring GHG emissions and reducing GHG emissions.

With regard to measurement, CEQ [issued](#) guidance for agencies when analyzing GHGs in their proposals. This guidance encourages agencies to consider GHGs when selecting between policy options and urges them to account for GHGs over the life cycles of their proposals. On a similar note, the Environmental Protection Agency (EPA) issued a notice of proposed rulemaking, supplementing its [2022 proposal](#), that would amend the [Greenhouse Gas Reporting Rule](#) with the goal of improving data collection and more effectively using that data in other Clean Air Act rulemakings. The proposal would add reporting requirements for additional sectors of the economy, and would update the rule to address revised global warming predictions.

Beyond EPA, the Federal Highway Administration (FHWA) also issued a rule addressing GHG emissions measures. The new rule instructs state departments of transportation to consider environmental sustainability—the carbon footprint—as a metric for assessing the [National Highway System](#) by measuring the percent change in on-road tailpipe CO₂ emissions relative to a given reference year. States are also expected to establish declining CO₂ targets under the rule.

EPA proposed new vehicle emissions standards for both [light- and medium-duty vehicles](#) and [heavy-duty vehicles](#) for model years 2027-2032. Due to technological advances in the zero-emissions vehicle space, the light- and medium-duty vehicle proposal addresses both GHG emissions and criteria pollutant emissions, unlike previous vehicle emissions rulemakings. The proposal would establish more stringent standards for criteria pollutants and GHGs, and it would introduce durability requirements for light-duty electric vehicle batteries. The proposal for heavy-duty vehicles only includes new standards for GHG emissions.

Regarding electricity generation, EPA proposed revised [New Source Performance Standards](#) (NSPS) for fossil fuel-fired electric generating units (EGUs). The revised NSPS aims to further reduce GHG emissions from new and reconstructed fossil fuel-fired stationary combustion turbine EGUs. The proposal would also repeal the Trump administration’s Affordable Clean Energy rule, as EPA argues that it did not reflect the best system of emissions reduction for steam generating EGUs. EPA also issued a [supplemental proposal](#) on an initial regulatory flexibility analysis for the revised NSPS.

5. Additional EPA Reversals

A common trend in each Regulatory Year in Review is presidential attempts to [reverse](#) the regulatory agenda of the previous administration. 2023 was no different, especially for EPA actions – including those not related to regulating GHG emissions.

First, EPA and the Army Corps of Engineers finalized a revised definition of “Waters of the United States” (WOTUS) on January 18, building on the pre-2015 definitions that were largely in place from 1977 to 2015. Changing the definition of WOTUS occurred during both the Obama ([2015](#))

and Trump administrations ([2019](#) and [2020](#)), and we included those actions [in each Year in Review since 2017](#).

In January, EPA also reconsidered a [Trump administration rule](#) from December 2020 that had retained the National Ambient Air Quality Standards (NAAQS) for Particulate Matter (PM), [proposing](#) instead to lower the primary annual standard for PM_{2.5} and taking comments on whether to retain or lower the primary and secondary 24-hour PM_{2.5} standards. The agency [held](#) a virtual public hearing on the proposal in February.

In March, EPA [revoked](#) the [2020 appropriate and necessary finding](#), which determined that it was not appropriate and necessary to regulate hazardous air pollutant (HAP) emissions from coal- and oil-fired power plants. This revocation also [reaffirmed](#) a 2016 finding “that it remains appropriate and necessary to regulate HAP emissions from EGUs after considering cost.” While in the prior section we focused on GHG emissions contributing to climate change, [HAP emissions](#) are distinct in that they focus on toxic air pollutants that are hazardous to human health. EPA currently regulates [188 HAPs](#) through the Clean Air Act.

In April, EPA also [proposed](#) amendments to the Mercury and Air Toxics Standards (MATS) – a related action to the reinstatement of the appropriate and necessary finding. In 2020, the Trump administration bundled the appropriate and necessary finding with a [residual risk and technology review](#) of MATS, which ultimately made no revisions to the MATS regulations. EPA’s 2023 proposal would amend several provisions for regulating HAP emissions from coal- and oil-fired power plants, including non-mercury metal pollutant standards and compliance demonstration requirements for coal plants, mercury standards for lignite-fired plants, and removing one option for defining the startup period for power plants.

6. PFAS

A major initiative for EPA is the Strategic Roadmap for regulating Per- and Polyfluoroalkyl Substances (PFAS), also known as “[forever chemicals](#),” that it finds are [linked](#) to adverse human health effects by an expanding body of scientific studies. In December, the agency [released](#) its annual progress report, wrapping up a year that featured multiple actions related to regulating PFAS in the environment.

In January, EPA [proposed](#) a significant new use rule for PFAS substances that are designated as inactive on the Toxic Substances Control Act (TSCA) Chemical Substance Inventory, [meaning](#) that they “have not been actively manufactured (including imported) or processed in the U.S. since 2006.” Under the rule, people or companies undertaking new activities that manufacture, process, or import covered PFAS substances would need to notify EPA 90 days before beginning those actions. EPA would then [determine](#) whether the new use would “present unreasonable risk to health or the environment.” Relatedly, EPA [finalized](#) TSCA reporting and recordkeeping

requirements in October to cover entities that manufactured or imported PFAS substances since 2011.

EPA also took several other actions that established or expanded reporting requirements for PFAS. A June final rule [updated](#) the Toxics Release Inventory (TRI) to include nine PFAS substances, as required by the National Defense Authorization Act for Fiscal Year 2020. Facilities operating in several industry sectors must report when [chemicals on the TRI](#) are released into the air or water. An October final rule [added](#) PFAS to the list of Lower Thresholds for Chemicals of Special Concern, which “eliminates the use of the *de minimis* exemption” for supplier notification requirements. This rule [intends](#) to ensure that purchasers of products know whether they contain PFAS for purposes of TRI reporting.

Another notable EPA action related to regulating PFAS was an April [ANPRM](#) that sought input and data on potentially designating seven types of PFAS as a hazardous substance under the Comprehensive Environmental Response, Compensation, and Liability Act (also known as Superfund). A [Superfund designation](#) would allow EPA to dedicate resources to cleaning up sites contaminated with PFAS. EPA [extended](#) the comment period for the advance notice in June, and the Fall 2023 Unified Agenda [indicates](#) that the agency may issue a proposed rule in 2025.

Finally, EPA promulgated regulations that seek to limit the concentrations of PFAS in drinking water. After finalizing a determination to regulate two categories of PFAS in March 2021, EPA [issued](#) a proposed rule in March 2023 that would designate additional PFAS substances as contaminants under Safe Drinking Water Act. The proposal also would create a National Primary Drinking Water Regulation that would establish and implement regulatory requirements for covered PFAS. Additionally, it would establish health-based Maximum Contaminant Level Goals for several PFAS that would set the health-based value at zero. These regulations are currently under [OIRA interagency review](#) and, according to the Unified Agenda, the agency [expects](#) to finalize the rule before the end of 2024.

7. Labor Regulations

Federal agencies took several notable actions related to labor regulations in 2023. The Department of Labor (DOL) issued a [proposal](#) in September to revise the regulations implementing the minimum wage and overtime pay exemptions under the Fair Labor Standards Act (FLSA). The FLSA [exempts](#) “any employee employed in a bona fide executive, administrative, or professional capacity” from the minimum wage and overtime pay requirements, which also includes outside sales and computer employees. DOL has implemented the exemption since 1940. A major revision in the proposed rule is to [increase](#) the salary level and the compensation threshold for highly compensated employees, which would affect which employees are included in the exemption. DOL [plans to](#) finalize the rulemaking by April 2024.

Another notable action by DOL in 2023 is that it [finalized](#) regulations implementing the Davis-Bacon and Related Acts (DBRA) in August. The over-200-page rule contains various revisions to the DBRA standards governing prevailing wages and fringe benefits for federal construction workers. Those revisions include updating the methodology for wage determination, adopting a new definition of “prevailing wage,” adding a mechanism to regularly update non-collectively bargained rates, adding new anti-retaliation provisions, and amending the cross-withholding procedure for recovering back.

As highlighted in our 2022 Review, the National Labor Relations Board proposed in September 2022 to rescind and replace its [2020 rule](#) on joint employer status. The agency [finalized](#) this rulemaking in October 2023. The rule establishes a new standard for determining whether two employers are joint employers of particular employees under the National Labor Relations Act. Following its publication, a coalition of business advocacy groups [challenged](#) the rule in court in November, resulting in a [delay](#) of the effective date from December 26, 2023 to February 26, 2024.

8. Immigration and Nonimmigrant Workers

Immigration is another recurring theme in our Regulatory Year in Review series. In 2023, the Department of Homeland Security (DHS) and the Department of Justice (DOJ) [proposed](#) and [finalized](#) a rule to address a [potential surge](#) of migration at the southwest border of the U.S. following the termination of the Centers for Disease Control and Prevention’s public health Order. Effective May 11, 2023, the rule encourages migrants to use lawful, safe, and orderly pathways into the U.S., or otherwise to seek asylum or other protection in another country through which they travel. It [introduces](#) a rebuttable presumption of asylum ineligibility for those who bypass such pathways. Also related to asylum claims, DHS and DOJ [finalized](#) a rule in March to implement an addition to the U.S.-Canada cooperation agreement on the examination of refugee status claims. The rule [extends](#) the agreement’s application to individuals who cross between the official ports of entry along the U.S.-Canada border and make an asylum or other protection claim within 14 days after such crossing.

Additionally, DHS [proposed](#) to amend its regulation governing immigrant visas in March. The current regulation, which was promulgated in 1952, allows consular officers to conduct an informal evaluation of the family members of an immigrant visa applicant to identify potential grounds of ineligibility. DHS proposed to remove this section, as it [concluded](#) that the informal evaluation can no longer provide a complete picture of an individual’s eligibility for a visa.

Agencies also moved forward with amending regulations applicable to nonimmigrant workers in 2023. First, DHS issued two proposals to amend its regulations governing the [H-1B](#) and [H-2](#) programs, respectively, including various revisions to the program requirements, definitions, and processes. Second, DOL took actions to revise the regulations regarding the certification of

temporary employment of H-2A agricultural workers. In a February [rule](#), DOL updated the methodology for determining the adverse effect wage rates for H-2A workers in certain occupations. In September, it [proposed](#) to make additional revisions to the certification of H-2A worker employment, which would partially address some of the comments received on the [2022 H-2A final rule](#). Third, toward the end of 2023, DOL [initiated](#) a rulemaking by seeking public input on revisions to Schedule A of the permanent labor certification process to include occupations in science, technology, engineering and mathematics (STEM) and other non-STEM occupations.

9. Banking Supervision

In response to the bank failures in 2023, federal agencies took steps to revise banking regulations established in the aftermath of the 2007-09 financial crisis. In September, the Office of the Comptroller of the Currency, the Federal Reserve Board, and the Federal Deposit Insurance Corporation (FDIC) issued two proposed rules to address the risks of large banking organizations' exposures. The first [proposal](#) would revise the capital requirements for large banking organizations and banking organizations with significant trading activity. In particular, the proposal would [increase](#) capital requirements for those banking organizations with heightened risk profiles, thus improving their capacity to absorb losses. The second [proposal](#) would require large bank holding companies, large insured depository institutions, and certain other banking organizations to issue and maintain minimum amounts of long-term debt. These requirements are intended to improve the resilience of covered entities and to provide banking regulators with more flexibility in case of failure. The agencies expect to finalize [both actions](#) by June 2024.

[Reviews](#) of the 2023 bank failures [reveal](#) that poor corporate governance and risk management practices were contributing factors to the failures. In October, FDIC issued [proposed guidelines](#) containing standards for corporate governance and risk management for large institutions. The proposed guidelines [describe](#) the general obligations of the board of directors in the institution to ensure good corporate governance, including the key component of an active and involved board protecting the interests of the institution rather than the interests of its parent or affiliate.

While not directly related to the recent bank failures, the Federal Reserve Board [finalized](#) a rulemaking [initiated](#) in 2016 to adopt risk-based capital requirements for depository institution holding companies that are significantly engaged in insurance activities. These requirements [aggregate](#) the required capital from insurance activities and banking activities. The Financial Stability Oversight Council [proposed](#) and [finalized](#) interpretive guidance that describes its process for designating whether to subject a nonbank financial company to prudential standards and supervision by the Federal Reserve. The final guidance replaced the 2019 interpretive guidance by [removing](#) three prerequisites to the exercise of the Council's nonbank financial company designation authority.

10. Merger Guidelines

In 2023, DOJ and the Federal Trade Commission (FTC) released new [merger guidelines](#). This is the first update of the horizontal merger guidelines since 2010. The guidelines present the criteria DOJ and FTC use to identify mergers that could raise concern. Some of the concerns identified in the guidelines include market concentration, reduced competition between firms, and how the merger affects competition for workers.

In a break with [precedent](#), the new merger guidelines address both horizontal (merger between substitute products) and vertical (merger between complements) mergers, whereas previously there were separate guidelines for horizontal and vertical mergers. According to Regulatory Studies Center Visiting Scholar [Mary Sullivan](#), the new guidelines also give the agencies more discretion in deciding which mergers to challenge because of the guidelines' broader antitrust objectives and the [lack of specifics](#) on "which mergers the Agencies intend to challenge" or not challenge.

Conclusion

While we highlight these ten regulatory themes, this is not an exhaustive list of important regulatory themes or actions that agencies addressed in 2023. Agencies issued new proposals up until the end of the year. Those include CEQ's [proposal](#) to revise the regulations implementing the National Environmental Policy Act, EPA's proposal to require water systems to remove all [lead pipes](#), and the Federal Communications Commission's proposal to [reinstate net neutrality](#). These are just a few actions that we will continue to monitor as they develop in 2024.