

Agencies are Rescinding Guidance Regulations at a Rapid Pace

By: Camille Chambers | July 7, 2021

In brief...

To implement President Biden's Executive Order 13992, executive branch agencies have begun to rescind the thirty-two regulations promulgated in response to President Trump's Executive Order 13891 on agency guidance documents. The fast withdrawal rate suggests that soon all guidance regulations will be reversed.

Anyone can relate to the frustrating experience of having a supervisor assign one task just for his replacement to scrap the entire project. Executive branch agencies can sometimes experience this phenomenon when the party of the president changes. The executive orders regarding guidance regulations issued by President Trump and his successor, President Biden, illustrates this experience. On October 9, 2019, President Trump issued [Executive Order \(E.O.\) 13891](#), "Promoting the Rule of Law Through Agency Guidance Documents." The executive order instructed agencies to establish or maintain "a single, searchable, indexed database that contains or links to all guidance documents" and promulgate or amend regulations that "set forth processes and procedures for issuing guidance documents." The purpose was to increase transparency and accessibility of guidance documents. Part of the reason for transparency was to ensure that people knew that guidance documents were not generally enforceable as a matter of law.

On the very first day in office, President Biden issued [E.O. 13992](#), "Revocation of Certain Executive Orders Concerning Federal Regulation" revoking E.O. 13891, among others. Federal agencies were instructed to rescind "any orders, rules, regulations, guidelines, or policies, or portions thereof, implementing or enforcing" the executive orders, as a means to "revoke harmful policies and directives that threaten to frustrate the Federal Government's ability to confront these problems and empowers agencies to use appropriate regulatory tools to achieve these goals."

This commentary focuses on the rulemaking actions of agencies in implementing E.O. 13891 and E.O. 13992.¹ In July 2020, Laura Stanley [commented](#) on the lag in agency compliance with E.O. 13891. By the

¹ For more information about the status of the agency guidance portals, the Competitive Enterprise Institute offers a useful resource on its [website](#).

end of President Trump's administration, thirty-one agencies had promulgated thirty-two guidance regulations. By June 17, 2021, fifteen agencies have rescinded or changed their guidance regulation. This commentary explores which agencies initially issued a regulation and which agencies have so far removed them. Particularly, this examination reports the number of cabinet-level agencies, the agencies that do not normally attract attention for publishing regulations, and the timing of issuing regulations.

What Happened

While it might be expected that all federal agencies will immediately respond to executive orders, the implementation of these executive orders shows that reality can be quite different. The revocation of E.O. 13891 placed agencies in a unique situation: one administration issued an executive order directing agencies to take certain actions, only to be revoked by a different administration a year and three months later, with direction to the agencies to completely undo what they had just done.

The response to implementing E.O. 13891 was varied. By January 20, 2021, 31 agencies issued a guidance regulation as directed by President Trump. By July 5, 2021, sixteen agencies rescinded their regulation as directed by President Biden. The GW Regulatory Studies Center [Tracker](#) records the agencies that published and rescinded a guidance rule. The quick turnover in the timing of the issuance and implementation and reversal of agencies responding to executive orders reflects the tumultuous world of agency rulemaking.

Which agencies issued a guidance regulation?

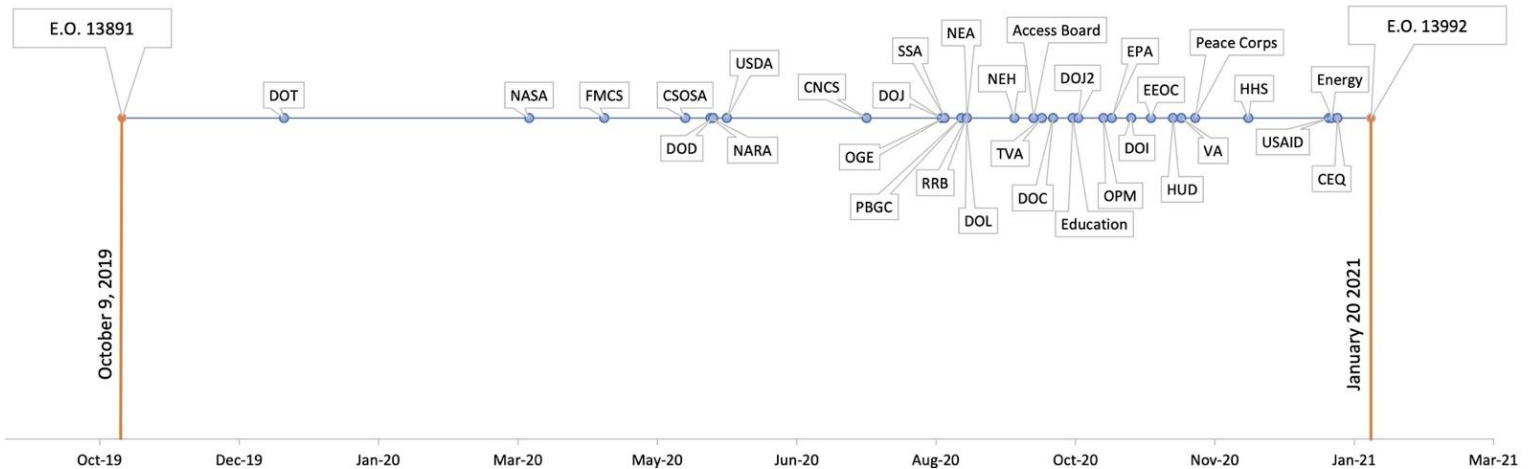
Thirty-one agencies issued guidance rules in accordance with E.O. 13891. Thirteen were cabinet-level agencies. Four cabinet departments, the State Department, Treasury Department, Department of Homeland Security, and the Small Business Administration, did not issue a guidance regulation.

The other eighteen agencies are a mixed bag. As might be expected, some of the agencies that issue large numbers of guidance documents and policies a year, such as the Social Security Administration and the Equal Employment Opportunity Commission, issued guidance regulations. Perhaps more surprising were agencies such as the Architectural and Transportation Barriers Compliance Board, the Court Services and Offender Supervision Agency for the District of Columbia, and others who do not generally provide guidance issued such rules. The seemingly arbitrary list of implementing agencies raises questions as to why only some agencies implemented E.O. 13891.

One possibility is that, because the rulemaking process takes time, agencies simply ran out of time to implement E.O. 13891. For example, the State Department included an entry for an [E.O. 13891 implementing rule](#) in its Spring 2020 Unified Agenda noting its intent to publish the guidance regulation, but never did. Most agencies were not able to promulgate a rule until almost September 2020, while a significant number of agencies issued a final rule well into the last months of President Trump's administration.

The table below shows the length of time it took agencies to publish their guidance regulations.

Table 1: Timeline of Guidance Regulation Publication



Which agencies rescinded their guidance regulations?

Within the first six months of President Biden’s administration, nearly half of the agencies who published a regulation had rescinded them. The faster rate that agencies rescind the guidance regulation compared to developing a rule suggests that it is far less time intensive to repeal a rule.

The following table summarizes the activity of agencies implementing E.O. 13891 and E.O. 13992.

Table 2: Rescission of Guidance Regulation by Agency^{2*}

Rescinded	Not Yet Rescinded
Department of Transportation* Environmental Protection Agency* Department of Interior* Department of Energy* Department of Labor* Department of Veterans Affairs*+ Department of Housing and Urban Development* Council on Environmental Quality Railroad Retirement Board U.S. Agency for International Development National Foundation for the Arts and Humanities Tennessee Valley Authority Federal Mediation and Conciliation Service Office of Government Ethics Pension Benefit Guaranty Corporation Social Security Administration	Department of Agriculture* Department of Commerce* Department of Defense* Department of Education* Department of Health and Human Services* Department of Justice* Architectural and Transportation Barriers Compliance Board Corporation for National and Community Service Court Services and Offender Supervision Agency for the District of Columbia Equal Employment Opportunity Commission National Archives and Records Administration National Aeronautics and Space Administration National Endowment for the Arts Office of Personal Management The Peace Corps
* Cabinet-level agencies. +The VA did not issue a rescission but instead amended procedures to remove references to E.O. 13891. Last updated July 5, 2021	

² See [RSC Guidance Tracker](#) for publication and effective dates.

As most agencies have already rescinded their guidance regulation, it is possible that the rest will quickly follow suit. For instance, as part of its Spring 2021 [Agenda](#), the Department of Justice (DOJ) states it will consider how to best implement E.O. 13992 with regard to its published guidance regulations. DOJ and other agencies could take inspiration from agencies that have already rescinded.

While the notices implementing the regulations specified how the guidance regulation benefited the agencies, along with the newly drafted section of the Code of Federal Regulation, the notices rescinding the regulations were short. For example, the Department of Interior (DOI) published a detailed [interim final rule](#), with a lengthy discussion of the new guidance regulation and compliance with the various required determinations such as the Regulatory Flexibility Act and the Administrative Procedure Act. When [rescinding](#) the same regulation, the DOI merely discussed the relationship of the two executive orders, determined that the final rule met the APA exemption from the notice and comment requirement, and removed the guidance regulation. Intriguingly, the notice also declared that the guidance website would remain active but would be “revised to remove any references to E.O. 13891.”

Similarly, it seems that some of the agencies that took a long time to issue a comprehensive guidance regulation had no trouble issuing a timely and short rescission notice. For instance, the United States Agency for International Development had issued a detailed [guidance regulation](#) nearly nine months past the deadline, but published a timely, and strikingly shorter, [rescission](#) within four months of E.O. 13992. To the extent that drafting the rescission rules does not require as much detail as the implementation rules, this could make it easier to agencies to undo them. This is worthy of additional study, because a more common expectation is that unwinding a rule can take as much consideration as writing a rule in the first place.

Conclusion

In short, tracking the implementation and reversal of E.O. 13891 reveals how changes in the political party of the White House affects the “existence” of a regulation. Observing the timeline in which agencies respond to the executive orders, supports the idea that—at least for certain procedural rules—it can be significantly more time-consuming to promulgate a regulation than it is to rescind.