

# 2020 Regulatory Year in Review

## *Ten Important Regulatory and Deregulatory Developments*

Mark Febrizio & Zhoudan Xie | January 13, 2021

This *Regulatory Insight* recaps ten notable themes related to federal regulations that occurred in 2020. Regulatory policymaking frequently intersected with noteworthy challenges facing the country. Agencies took various regulatory actions in response to the COVID-19 pandemic. The midnight regulation phenomenon also resurfaced at the end of the Trump administration, as it has for previous outgoing presidents. Among other important actions, some represent multi-year efforts of the Trump administration, such as the update to regulations implementing the National Environmental Policy Act (NEPA), while others signal the initiation of possible rulemakings, such as reinterpreting the laws governing the liability of social media companies. Under a new administration with different policy priorities, many of these rulemaking activities and their implementation will face great uncertainty.

### 1. Midnight Regulations

The time between election day and the inauguration of a new president is called the “midnight” period, which has been historically [characterized](#) by an increase in regulatory output as the outgoing administration rushes to complete its policy priorities. Regulations published during this period—known as midnight regulations—are often evaluated with close scrutiny because of concerns about rules [with lower-quality analysis](#) being expedited through the rulemaking process. Rather than being a new trend, [evidence](#) of this phenomenon [extends](#) back to at least the Carter administration.

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Like the uptick in regulatory activity under [previous](#) presidential administrations, President Trump has also ramped up issuing new regulations, as is [evident](#) from the Fall 2020 Unified Agenda. Active economically significant actions from the Agenda are a [useful indicator](#) of the president's midnight policy priorities. As our colleague Daniel R. Pérez [concluded](#), environmental regulations make up a substantial portion of midnight rules by the Department of Transportation (DOT) and Environmental Protection Agency (EPA), and the biggest planned actions from the Department of Homeland Security (DHS) and Department of Labor (DOL) focus on more restrictive immigration policies. Although it might be [too early](#) to compare the volume of Trump's midnight regulations with prior administrations, data [indicate](#) that the Trump administration completed rules at a higher rate in 2020 than it had in previous years. However, some of the increase in activity [likely corresponds](#) to rules related to the COVID-19 pandemic.

One notable trend evident in the midnight period is the increasingly regulatory rather than deregulatory slant of the Trump administration actions. When looking at [active economically significant actions](#), the Trump administration has shifted to a more regulatory than deregulatory trend in contrast to its initial Unified Agendas. This directional change was also [noticeable](#) earlier this year in the Spring 2020 Unified Agenda.

A second noteworthy trend is that the Fiscal Year (FY) 2020 Regulatory Reform Report was not bundled together with the Fall 2020 Unified Agenda.<sup>1</sup> The Office of Information and Regulatory Affairs (OIRA) handled last year's rollout similarly, issuing the [FY 2019 report](#) several weeks after the [Fall 2019 Unified Agenda](#). Nevertheless, the Fall 2020 Agenda includes pertinent information on rules subject to Executive Order (EO) 13771, and the document's introduction even highlights the "[record success](#)" of the regulatory budget in FY 2020 by claiming "regulatory cost savings of more than a hundred billion dollars." Dan Bosch and Dan Goldbeck of the American Action Forum [projected](#) that the Trump administration did in fact achieve net cost savings in FY 2020 under EO 13771, but that these savings were entirely attributable to one rule—the [Safer Affordable Fuel-Efficient \(SAFE\) Vehicles Rule](#). Excluding that single rule, the administration imposed net costs of [nearly \\$30 billion](#) in its last full fiscal year. Furthermore, [only some actions](#) are designated as EO 13771 actions: regulatory actions that are not considered significant under EO 12866 and regulations from independent agencies are not included in the totals. When [all finalized regulations](#) are accounted for, "[f]ederal agencies collectively published \$14.7 billion in net regulatory costs in 2020," according to [American Action Forum data](#).

After four years of implementing EO 13771, the forthcoming report is expected to detail the overall results of the regulatory budgeting initiative through September 2020. Since President-elect Biden is [expected](#) to repeal EO 13771, the FY 2020 report combined with the effects of midnight regulations may define the total impact of the program. As of [January 11, 2021](#), agencies had

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<sup>1</sup> This recurring report tracks agency compliance with President Trump's Executive Order 13771 on regulatory budgeting. The FY 2020 report would cover regulatory activity from October 2019 through September 2020.

published 68 deregulatory actions and 27 regulatory actions in FY 2021 (which began on October 1, 2020) that total \$39.1 billion in quantified total net costs.

## 2. Emergency Regulations Addressing the COVID-19 Pandemic

On January 31, the Secretary of Health and Human Services (HHS) [determined](#) a public health emergency that involves a novel coronavirus first detected in Wuhan, China. Despite the travel restrictions imposed [starting](#) January, the coronavirus quickly spread in the United States. On March 13, President Trump [declared](#) a national emergency for the coronavirus disease COVID-19. Last year, federal agencies took various regulatory actions in response to the public health crisis, including many regulations issued on an emergency basis for preventing, testing, and treating COVID-19.

The early responses include travel restrictions intended to prevent the introduction and transmission of COVID-19 into the United States. Beginning January 31, President Trump [issued](#) several proclamations suspending entry of aliens who were present in certain countries with coronavirus outbreaks within 14 days preceding their entry into the United States. On February 2, DHS began [enforcing](#) arrival restrictions on flights carrying passengers with recent travel from or presence in China. Flights subject to the arrival restrictions were required to land at designated airports where enhanced public health measures were implemented. As the coronavirus spread globally, such arrival restrictions soon [expanded](#) to travelers from other countries. On March 24, the Centers for Disease Control and Prevention (CDC) [issued](#) an interim final rule to amend its foreign quarantine regulations to suspend the introduction of persons from designated countries. Since late March, the travel of individuals from [Canada](#) and [Mexico](#) at land ports of entry has also been limited to “essential travel.”

On February 4, the HHS Secretary [declared](#) another determination of public health emergency under section 564 of the Federal Food, Drug and Cosmetic Act, which [enables](#) the Food and Drug Administration (FDA) to issue Emergency Use Authorizations (EUAs) in response to COVID-19. An EUA authorizes emergency use of drugs, devices, and other medical products that have not gone through the FDA approval process. So far, FDA has [issued](#) a number of EUAs covering *in vitro* diagnostic products, personal protective equipment (PPE), ventilators, and other medical devices for diagnosing, preventing, and treating COVID-19.

To ensure sufficient health and medical resources for domestic use, President Trump issued several executive orders (EOs [13909](#), [13910](#), and [13911](#)) in March regarding the prioritization and allocation of certain [scarce or threatened](#) materials needed to respond to COVID-19, including PPE and ventilators. Pursuant to the executive orders, the Federal Emergency Management Agency (FEMA) [issued](#) temporary rules to prohibit exports of these materials without explicit approval. FEMA also [reached](#) a voluntary agreement with the private sector aimed at improving “the effectiveness of the manufacture and distribution of Critical Healthcare Resources.”

### 3. Regulations Implementing COVID-19 Economic Relief Bills

Regulatory responses to the pandemic also include regulations to address economic impacts of COVID-19. On March 27, Congress passed, and President Trump signed into law, the Coronavirus Aid, Relief, and Economic Security (CARES) Act to provide immediate assistance for individuals, families, and businesses. The CARES Act authorized the Small Business Administration (SBA) to create the Paycheck Protection Program (PPP), a new loan program to assist small businesses adversely affected by the pandemic. On April 15, SBA [published](#) the first interim final rule to specify eligibility, procedures, and requirements of the PPP, which were [amended and clarified](#) by subsequent rules throughout the year. Related agencies also issued regulations regarding the implementation of the PPP. For example, the National Credit Union Administration [issued](#) an interim final rule on April 27 amending its regulatory capital rule to provide that covered PPP loans receive a zero percent risk weight.

Other agencies also issued noteworthy regulations implementing the CARES Act. For example, the Department of Agriculture [implemented](#) the Coronavirus Food Assistance Program to provide financial assistance for agricultural producers affected by COVID-19. The CARES Act also establishes relief funds for educational institutions and students, but the Education Department's controversial implementation of the Act [was met with](#) litigation.

Another important economic relief bill passed last year is the Families First Coronavirus Response Act, which creates emergency paid leave requirements. DOL [promulgated](#) a temporary rule in early April to set forth time-limited paid sick leave and expanded family and medical leave requirements for covered employers. In September, DOL [issued](#) another temporary rule to revise and clarify its regulations as a result of a lawsuit challenging certain portions of the April temporary rule.

### 4. Regulatory Relief, Extensions, and Exemptions

In addition to the economic support, various agencies issued rules to postpone, rescind, waive, or provide exemptions from existing regulatory requirements in response to the COVID-19 pandemic. For example, the New York University School of Law's Institute for Policy Integrity [tracked](#) federal agency actions to waive or stop enforcing environmental regulations between March and May. Those actions include EPA's temporary [waiver](#) of reporting requirements for air or water pollution, the National Oceanic and Atmospheric Administration's [waiver](#) of observer coverage requirements for fishing boats, and the Nuclear Regulatory Commission's [permission](#) of long worker shifts that were otherwise prohibited by current regulations.

Similar regulatory relief was also provided in other policy areas. In the financial sector, for example, the Office of the Comptroller of the Currency [increased](#) maturity limits for national banks to operate short-term investment funds affected by COVID-19 disruptions. HHS [exempted](#) health

care providers providing telehealth services through remote communication technologies from penalties for noncompliance with the requirements of HIPAA rules. In the labor market, employers who seek to hire certain H-2B nonimmigrants faced [fewer limitations](#) if the temporary labor or services were essential to the U.S. food supply chain.

While most of the regulatory flexibilities were implemented on a temporary basis, President Trump [signed](#) an executive order (EO 13924) on May 19 to direct agencies to review those waivers, extensions, and exemptions and “determine which, if any, would promote economic recovery if made permanent.” Pursuant to the executive order, the [Internal Revenue Service](#) and [HHS](#) respectively sought comments from the public in November to determine which temporary regulatory actions should be made permanent.

## 5. Agency Compliance with EO 13891 on Guidance Documents

As we recounted in last year’s [review](#), President Trump signed two executive orders to affect agencies’ use of guidance documents in regulatory matters. One of these directives—EO 13891 of October 9, 2019—continued to be an important theme in 2020 as agencies took visible steps to comply with its requirements.

Borne out of a concern that guidance documents, which are legally non-binding, have been interpreted by regulated entities as binding in practice, EO 13891 [addresses](#) the transparency of existing guidance documents and the process for issuing new ones. First, the order sought to increase the [transparency](#) of existing guidance documents, giving agencies until [February 28, 2020](#) to organize them into “a single, searchable, indexed database” available to the public, and agencies were granted a grace period to reinstate any missed documents by [June 27, 2020](#). Second, the order directed agencies to revise their [process](#) for issuing and reviewing guidance documents, including provisions for public input and special requirements for reviewing “significant” guidance documents. The order required agencies to implement the process changes by [April 28, 2020](#).

As our colleague Laura Stanley [wrote](#) in July, agency responses to this “guidance executive order” have been inconsistent. Related to the transparency plank, agencies like [EPA](#), [DOT](#), and [DOL](#) made indexed, searchable databases of their guidance documents publicly available by the deadline. In December 2019, DOT was the first agency to comply with the second plank of EO 13891, [publishing](#) a “[rule on rules](#)” that in part altered agency procedures for issuing guidance. But most agencies failed to revise their process for issuing guidance documents by the deadline, falling short of the process-related directives.

Nevertheless, many agencies continued to take steps to revise their internal procedures for guidance documents throughout 2020. In total, 27 agencies published 30 final actions (including

interim and direct final rules) in the Federal Register in 2020.<sup>2</sup> Despite missing deadlines included in the executive order, agencies finalized changes to their internal procedures that alter how they issue guidance documents. The [practical effects](#) on how agencies use guidance and regulated entities interpret guidance are most likely still to be seen.

## 6. Immigration Regulations

Last year's list [highlighted](#) DHS's [Public Charge](#) rule—arguably one of the most controversial rules of the Trump administration which had its implementation [temporarily stalled](#) in federal court by a [preliminary injunction](#). But 2020 brought a flurry of immigration-related regulations—predominantly from DHS, the Department of Justice (DOJ), and DOL—that underscore the restrictive immigration policy of the Trump administration.

Federal agencies issued final rules in 2020 on a number of important immigration policy issues.<sup>3</sup> In August, DHS [finalized](#), and then [twice corrected](#), changes to the fees charged by U.S. Citizenship and Immigration Services (USCIS) for certain immigration and naturalization benefit requests. However, DHS has not yet implemented the adjustments because the rule [remains enjoined](#) by a federal court decision. DHS and DOJ issued a series of regulations affecting asylum procedures and eligibility rules. For example, an [October rule](#) expanded the grounds for [mandatorily barring asylees](#), one [December rule](#) streamlined proceedings and altered review standards for credible fear determinations, a [second December rule](#) sought to reduce asylum claims from individuals crossing the southern border, and a [third December rule](#) extends the grounds for barring asylum eligibility for individuals endangering U.S. security through risk of communicable diseases.

Related to employment-based immigration, DHS [attempted](#) to make changes to its H-1B visa program through a proposed rule but [withdrew](#) the NPRM and issued it as an interim final rule instead—an extremely unusual action. However, a federal court [set aside](#) DHS's action, and a related [DOL rule](#), for violating the Administrative Procedure Act. Another rule on H1-B visa policy proceeded in strange fashion. Even though the rule was [proposed](#) as an [economically significant](#) action in November, OIRA [waived](#) regulatory review of the final rule, and DHS finalized the [rule in January 2021](#) without making any [changes](#) in response to comments. Other actions related to labor policies for immigrants include two [economically significant](#) DOL rules affecting the temporary employment of H-2A workers, a [proposed rulemaking](#) from DHS that would [limit the length of time](#) international students can stay in the country, and a [DHS proposal](#) pending regulatory review at OIRA that would remove employment eligibility for spouses of H-4 visa holders.

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<sup>2</sup> Based on authors' [search](#) of the Federal Register for keywords, "Executive," "Order," "13891," and manual filtering of results. The spreadsheet is available for [download](#) or can be requested from [mfebrizio@gwu.edu](mailto:mfebrizio@gwu.edu).

<sup>3</sup> Some these final rules were proposed earlier in 2020.

Multiple rulemakings exhibited substandard analysis inconsistent with the regulatory best practices outlined in EO 12866. For instance, two DHS proposals on the [use and collection of biometrics](#) and the [affidavit of support requirements](#) on behalf of immigrants failed to establish the significance of problems to be solved or consider alternative approaches to the preferred regulatory options. The lack of compliance with longstanding analysis requirements are particularly concerning because [both rules](#) are estimated to impose billions of dollars in costs in exchange for qualitative benefits.

## 7. Section 230 and Social Media Regulation

On May 28, President Trump signed an [executive order](#) on “Preventing Online Censorship,” directing the Department of Commerce to petition the Federal Communications Commission (FCC) for a rulemaking to interpret section 230 of the Communications Decency Act. [Section 230](#) provides the [basic principle](#) that websites, such as Facebook and Twitter, are not liable for the content generated by third-party users. Members of Congress have [increasingly](#) criticized the broad immunity that Section 230 creates, although lawmakers [disagree](#) on why and how to reform the statute. The executive order in May largely followed [complaints](#) about anti-conservative censorship performed by allegedly left-leaning tech companies. Among other instructions, the executive order [calls for](#) a clarification of “the conditions under which an action restricting access to or availability of material is not ‘taken in good faith’” as defined by the statute.

Pursuant to the executive order, the National Telecommunications and Information Administration (NTIA) of the Commerce Department [filed](#) a petition on July 27 to request FCC to initiate a rulemaking to clarify provisions of Section 230. In a statement released on October 15, FCC Chairman Ajit Pai [announced](#) that he would move forward with the rulemaking, followed by FCC General Counsel’s [confirmation](#) that the agency has legal authority to interpret Section 230. As our colleague Jerry Ellig [discussed](#) in a comment submitted to NTIA, the rulemaking, if proceeded, would likely have significant economic effects and hence require a full benefit-cost analysis.

The political battle around Section 230 has expanded beyond agency action. On December 23, President Trump vetoed the 2021 defense authorization bill, following his previous [threat](#) that he would veto the bill if lawmakers failed to include language repealing Section 230. The Senate later voted to [override](#) the president’s veto.

The FCC currently has a 3-2 Republican majority, but it does not have time to conduct a notice-and-comment rulemaking on Section 230 before Chairman Pai [departs](#) on January 20. Scholars at the Brookings Institution [noted](#) that “it is probable that a Biden-Harris FCC will dismiss any further agency action on Section 230 enforcement—leaving this issue to be resolved by Congress.”

## 8. Updating NEPA Regulations

In 2020, the Council on Environmental Policy (CEQ) within the Executive Office of the President finalized an update to its regulations implementing NEPA. This effort to revise NEPA regulations dates back to the beginning of the Trump administration with [EO 13807](#) of August 15, 2017. EO 13807 directed CEQ to [create](#) a list of actions to modernize environmental reviews and [form](#) an interagency working group to review NEPA implementing regulations, among other provisions. On September 14, 2017, CEQ [published](#) its list of initial actions, which [included](#) a plan to review CEQ's NEPA regulations. Following through on the plan, CEQ [published](#) an advance notice of proposed rulemaking in June 2018 to request feedback on updating its procedural provisions for implementing NEPA.

After over two years of buildup, CEQ completed the process for revising its NEPA regulations. In January 2020, CEQ [published](#) a proposed rule that would update its NEPA regulations and accepted public input for two months. The agency [received](#) more than 1 million public comments, including a [comment](#) submitted by one of us (Mark). Roughly four months after the comment period close, CEQ [finalized](#) the update to its NEPA regulations in July.

Although prior administrations have undertaken [initiatives](#) to modernize the NEPA process, the 2020 final rule was the [first substantive revision](#) to CEQ's NEPA implementing procedures since 1986. But CEQ's regulations are only one component of federal NEPA procedures as federal agencies also [have their own implementing procedures](#) that supplement CEQ's NEPA regulations and are developed in consultation with CEQ. Some agencies updated their respective NEPA implementing procedures in 2020 after CEQ finalized its regulations, such as the [U.S. Forest Service](#) in November and the [Department of Energy](#) (DOE) in December. Others like [DOT](#) proposed revisions to their implementing procedures, and EPA has its own [modifications pending OIRA review](#). Since CEQ's policies are likely to shift substantially under a Biden administration, whether federal agencies will continue to finalize their own NEPA procedures in response to the 2020 final rule is uncertain.

## 9. EPA Rules on Regulatory Process

In 2020, EPA continued its efforts to increase consistency and transparency in the agency's regulatory process by finalizing two significant actions that we highlighted in our [2018 Year in Review](#). The first is the rule on "Strengthening Transparency in Regulatory Science." EPA [proposed](#) the rule in April 2018, which received substantial attention and [extensive](#) comments from the public. In a GW Regulatory Studies Center comment submitted to EPA, Susan Dudley [concluded](#) that the proposal "includes reasonable steps that could improve the evidential basis for its regulatory policies." However, the rulemaking is not free of controversy. Critics raised [concerns](#) about the risk of jeopardizing personal privacy and restricting the data that could be used in the agency's rulemaking.



In March 2020, EPA [issued](#) a supplemental notice of proposed rulemaking (SNPRM) to add clarifications and modifications to the 2018 proposal. In the SNPRM, EPA intended to expand the scope of the proposed rule and provided alternative approaches for how the agency would consider data and model availability when evaluating studies. After soliciting public input with an [extended](#) comment period, EPA [finalized](#) the rule on January 6, 2021. To largely address the concerns raised in comments, the final rule [focuses](#) on a smaller scope of studies and data than the SNPRM proposed. Faced with continuous [criticism](#) about potential restrictions that the rule imposes on EPA’s ability to use some scientific research, EPA Administrator [stressed](#) that the rule is to improve transparency of the agency’s scientific processes by providing more opportunities for public scrutiny. Given the timing of when the rule was finalized, it will likely fall within the [Congressional Review Act window](#), providing a [possible tool](#) for the Biden administration to nullify the rule.<sup>4</sup>

Second, EPA [finalized](#) the rule titled “Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process.” The agency first published the rulemaking in an [advance notice](#) of proposed rulemaking (ANPRM) in 2018, soliciting comments broadly on how it should create a framework for consistent and transparent benefit-cost analysis (BCA). The rulemaking activity continued in 2020 with a [proposed rule](#) issued in June and a [final rule](#) in December, focusing on the application of BCA to rulemakings conducted under the Clean Air Act (CAA). The rule contains three elements: (1) requiring EPA to prepare a BCA for all future significant regulations under the CAA, (2) requiring EPA to “develop the BCA using the best available scientific information and in accordance with best practices from” related fields, and (3) setting forth additional procedural requirements to increase transparency in presenting and considering the BCA results.

Presidents of both parties have long [required](#) the consideration of benefits and costs in promulgating significant regulations, and increased consistency and transparency in regulatory analysis could [improve](#) policy decisions. In the [comments submitted](#) to EPA, GW Regulatory Studies Center scholars Brian Mannix and Joseph Cordes discussed how the agency should consider the relatively controversial [features](#) of the rule with respect to co-benefits, non-domestic benefits, and discounting.

## 10. Substantive Environmental Actions

Beyond promulgating process-related rules affecting environmental policy, EPA and other federal agencies have moved forward with substantive changes to environmental rules. Some regulatory

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<sup>4</sup> EPA says that its rule is not subject to the Congressional Review Act “because it is a rule of agency organization, procedure or practice that does not substantially affect the rights or obligations of non-agency parties.” *See*, 86 FR 491, <https://www.federalregister.gov/d/2020-29179/p-282>. Such a claim would likely need to be adjudicated in federal court.

actions in 2020 were part of multi-year efforts to [reverse](#) Obama-era environmental policies, such as two final actions published in April 2020.

First, the Army Corps of Engineers and EPA [promulgated](#) the final step in the Trump administration's process for revising the definition of "Waters of the United States" (WOTUS). Last fall, the agencies completed the first step in the [two-step rulemaking processing](#) by repealing the definition established by a [2015 Obama administration rule](#) and restoring the previous regulatory text. The second step on April 21, 2020 replaced the existing regulations with a revised, streamlined, and narrower definition of WOTUS under the Clean Water Act. In a [comment](#) on the [2019 proposed rule](#), Jonathan H. Adler (law professor at the Case Western Reserve University School of Law) characterized the proposal as "both more clearly defined and more circumscribed" than the previous 1986 and 2015 definitions.

Second, EPA and DOT [published](#) the joint SAFE Vehicles Rule on April 30, which amended carbon dioxide standards and modified or set fuel economy standards for model years 2021-2026—the latter are referred to as the [Corporate Average Fuel Economy \(CAFE\) Standards](#). The rule finalized less strict standards than those established under the Obama administration, making it a [deregulatory action](#) under EO 13771 and entirely [providing](#) the net cost savings claimed by the Trump administration for FY 2020.

Although WOTUS and the SAFE Vehicles Rule were perhaps the most salient rules finalized in 2020, additional notable EPA actions include [multiple regulations](#) that modified the Mercury and Air Toxics Standards (MATS) for power plants and two final rules [revising](#) New Source Performance Standards (NSPS) for the oil and gas industry. Most important among the actions affecting MATS was EPA's [final rule](#) that rescinds the "appropriate and necessary" finding for regulating hazardous air pollutant emissions. Besides EPA, other agencies published regulatory actions with environmental implications. The Department of Interior released Records of Decision, the final component of the NEPA process, to [approve](#) an oil and gas leasing program in the Alaska National Wildlife Refuge and to [develop regulations](#) that define the scope of the Migratory Bird Treaty Act. DOE has promulgated several changes to its energy conservation program in 2020, including new standards for product classes of [clothes washers and clothes dryers](#) and revised test procedures for [showerheads](#).