

2019 Year in Review

Top Ten Regulatory Developments

A wide range of areas—including administrative procedures, environment and energy, nutrition benefits, immigration, and healthcare—experienced important regulatory developments during the past year. This *Regulatory Insight* highlights ten notable themes related to regulation that occurred in 2019, just as our lists for [2017](#) and [2018](#) did.

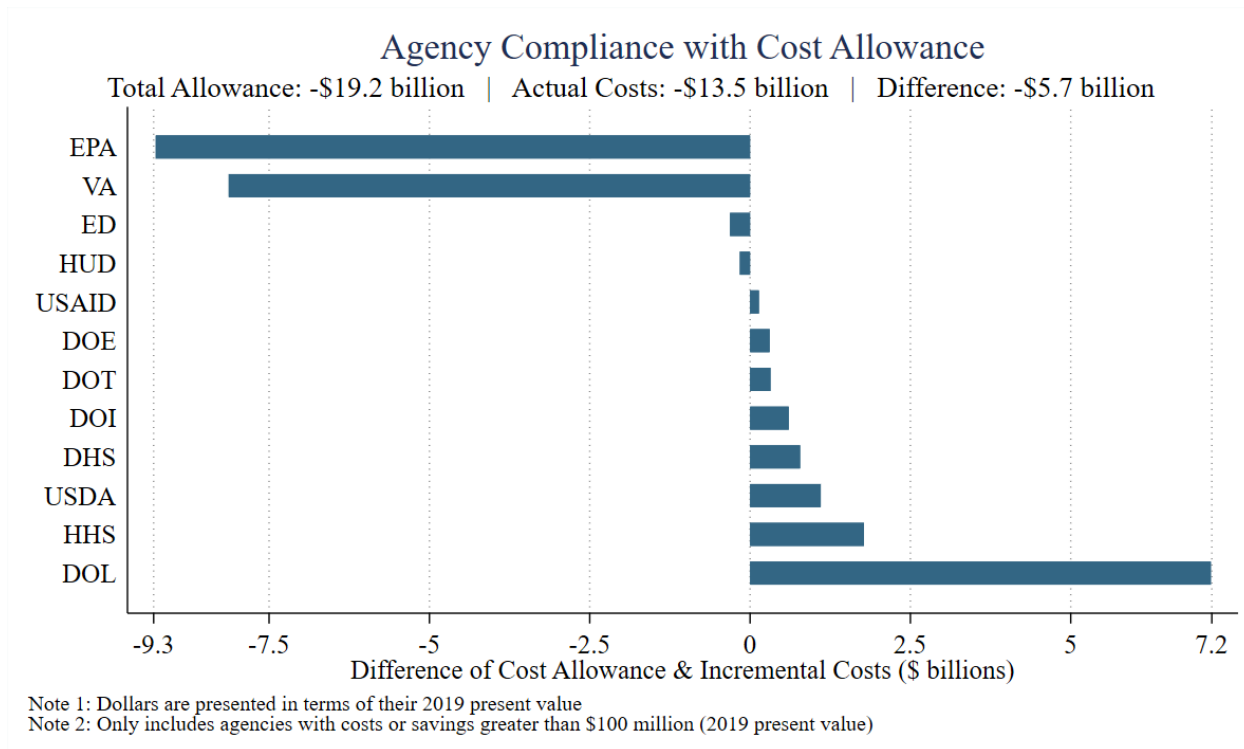
1. Fiscal Year 2019 Regulatory Reform Report

The Office of Information and Regulatory Affairs (OIRA) continued reporting on the status of the Trump administration’s regulatory reform efforts under [Executive Order \(EO\) 13771](#), which [required](#) executive branch agencies to implement a two-for-one scheme for new rules and operate under a regulatory cost cap. For the third straight year, OIRA announced that agencies produced net cost savings, at least among actions covered by the order. However, as one of us [previously argued](#) (in a commentary co-authored with Daniel R. Pérez), “a look beyond the topline figures highlights several ‘firsts’ in agency implementation of EO 13771—the ratio of significant actions falling below the 2-for-1 metric, agency cost savings coming up short of their government-wide targets, and next year’s budget caps permitting some agencies to impose net costs.”

Even though agencies failed to meet government-wide cost savings targets, compliance varied substantially across agencies. As the following figure [depicts](#), the Environmental Protection Agency (EPA) and the Department of Veterans Affairs led to agencies exceeding the government-wide regulatory cost allowance. The numbers in the figure represent the difference between each agency’s cost allowance and its incremental costs for the fiscal year. In other words, agencies that failed to comply with their annual cost allowance are shown as making negative contributions to the total cost allowance.

This insight reflects the views of the authors, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center’s policy on research integrity is available at <http://regulatorystudies.columbian.gwu.edu/policy-research-integrity>.

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The administration’s regulatory accomplishments may become clearer as the country enters President Trump’s fourth year and more data emerges. One panel of scholars [concurred](#) that the administration’s policies “had slowed the pace of new regulations,” although the durability of those efforts and initiatives are [questionable](#). Two [recent articles](#) from regulatory experts, after considering the most recent OIRA report, suggested that the administration’s deregulatory efforts have accomplished relatively minimal results.

2. Executive Orders on Guidance

President Trump signed two executive orders in October 2019, which intend to alter how agencies use guidance documents to advance regulatory goals: 1) [EO 13891](#), “Promoting the Rule of Law through Improved Agency Guidance Documents;” and 2) [EO 13892](#), “Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication.”

The first, EO 13891, [governs](#) the treatment and usage of guidance documents in legal and practical terms, addresses the development of new guidance documents, and provides for public availability of guidance documents. The directive—which [applies](#) to executive branch agencies—reinforces the non-binding nature of guidance documents, meaning that they provide informational or interpretive value but are not legally enforceable.

According to law professor Nick Parillo, a key [innovation](#) is its requirement for agencies to establish procedures for issuing guidance documents, including soliciting public comment before

finalizing a “significant” guidance document. Along with other approaching deadlines in the order, by [February 28, 2020](#), agencies must “establish a single, searchable, indexed website” containing all guidance documents in effect (the clock for that deadline began once the Office of Management and Budget [issued](#) the implementing memorandum).

The second directive, EO 13892, works to align agency enforcement actions with the constraints established in the Administrative Procedure Act (APA), specifically by outlining principles for how guidance can be properly used in civil enforcement and adjudication. For instance, the order [states](#), “The agency may not treat noncompliance with a standard of conduct announced solely in a guidance document as itself a violation of applicable statutes or regulations.”

The intent of both executive orders was [summed up](#) neatly by GW Regulatory Studies Center (RSC) director Susan Dudley: guidance should function as shields for regulated entities, not swords wielded by agencies. In other words, guidance can clarify when a regulation or provision applies but should not impose binding requirements or be considered dispositive.

3. Advances in the “Waters of the United States” Two-Step Process

The EPA and the Army Corps of Engineers took major strides to implement the [two-step process](#) for reviewing the “Waters of the United States” (WOTUS) rule. Along with the following entry on the Clean Power Plan, the revisions to WOTUS represent one of multiple efforts to replace Obama-era EPA rules with new actions.

Building off a [2017 notice of proposed rulemaking \(NPRM\)](#) and a [2018 supplemental NPRM](#), the agencies completed the first step in the process. A [final rule](#)—effective December 23, 2019—repealed the 2015 Clean Water Rule and recodified the previously existing definition of “waters of the United States.” The agencies are pursuing the second step in a separate rulemaking that would revise the definition in a manner consistent with the directives in [EO 13778](#), “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.” EPA and the Army Corps [published](#) a proposed rule to revise WOTUS in February 2019.

In a public interest comment [submitted](#) on the 2019 NPRM, law professor Jonathan H. Adler shared three principles for the agencies to keep in mind as they review comments on the proposal. Furthermore, he [argued](#) that the revised “definition is more consistent with the text of the CWA and applicable Supreme Court precedent than prior definitions,” a view expanded upon in a [subsequent article](#) in the summer 2019 issue of *Regulation*. However, others have been critical of the revised WOTUS rule. The EPA Science Advisory Board (a public advisory group distinct from the offices conducting regulatory policy within EPA) [released](#) a [draft report](#) on the proposed rule, which “concluded that aspects of the proposed rule are in conflict with established science, the existing WOTUS rule developed based on the established science, and the objectives of the Clean Water Act.”

4. Affordable Clean Energy Rule Replaces the Clean Power Plan

While efforts related to WOTUS are still in progress, EPA’s replacement for the Obama-era regulation of greenhouse gas (GHG) emissions from existing electric generating units (EGUs) was finalized in 2019. Following a [2017 advance notice of proposed rulemaking](#) and a [2018 NPRM](#), EPA published a final rule that [included](#) “three separate and distinct rulemakings:”

1. Repealing the Clean Power Plan (CPP);
2. Finalizing the Affordable Clean Energy (ACE) Rule;
3. Finalizing new implementing regulations affecting any future emission guidelines under section 111(d) of the Clean Air Act.

Although EPA proposed reforms to the New Source Review (NSR) with the ACE Rule, any final action on the proposed NSR reforms will be included in a [separate action](#).

RSC research professor Brian Mannix [submitted](#) a public interest comment on the 2018 proposed ACE Rule, which supported the repeal of the CPP—citing flaws in its regulatory impact analysis—and made suggestions related to properly calculating the social cost of carbon for EPA rulemakings.

Notably, even though the ACE Rule is viewed along with the administration’s deregulatory efforts, the final rule was [classified](#) as an EO 13771 regulatory action, imposing net regulatory costs rather than producing cost savings. This is attributable to the baseline chosen for analysis: the ACE Rule was compared to a baseline where the CPP was not implemented because the [Supreme Court stayed](#) the Obama administration’s rule. As [one of six](#) EO 13771 regulatory actions finalized by EPA in 2019, the ACE Rule contributed to the agency [exceeding](#) its [FY 2019 cost allowance](#).

5. Revising the Process Rule for Energy Conservation Standards

For decades, the Department of Energy (DOE) has [managed](#) the agency’s program for adopting energy conservation standards and test procedures for both consumer appliances and commercial equipment. A key part of the program, alongside the rulemakings related to [specific products](#), are the [regulatory processes](#) for establishing new or revised standards or test procedures—most importantly the [Process Rule](#). In the mid-1990s, DOE’s “formal effort ... to improve the process it follows to develop energy conservation standards for covered appliance products” [resulted in](#) a final rule published in the Federal Register and codified in the Code of Federal Regulations.

In light of [multiple challenges](#) with the existing processes, the agency has taken steps to further improve the Process Rule, [starting](#) with a [2014 request for information](#) during the Obama administration and then renewed by a [2017 request for information and notice of public meeting](#) under the Trump administration. However, the biggest strides arguably were made in 2019, with

the publication of a [proposed revision](#) to the Process Rule and a [notice of data availability](#) to facilitate the creation of a “significant energy savings threshold” in the updated standards.

One of us filed a [public interest comment](#) that focused on eight areas in the revised Process Rule to highlight beneficial changes and opportunities for additional improvements. A [shorter commentary](#) also summarizes the main points in the public comment, specifically examining how the revisions to the Process Rule connect to broader concepts in regulatory policy. Notably, a critical proposed change is that the rule would make the finalized procedures binding on the agency. A more predictable rulemaking process enforceable by judicial review, along with enhanced incentives to implement ideas like early stakeholder input, could increase the quality and effectiveness of future energy efficiency standards.

On December 31, 2019, the agency issued a [pre-publication version](#) of the final Process Rule, which is still awaiting official publication in the Federal Register. DOE will also publish a [proposed rule](#) to further clarify how it would amend a specific component of the process (the “walk-down” approach for comparing different potential standards). Before offering detailed comment on the final rule, we still need to digest the provisions in the nearly 350-page document (keep up to date using DOE’s webpage on the Process Rule [here](#)).

6. Transportation Department Issues a Rule on Rules

In December, the Department of Transportation (DOT) issued a [final rule](#) on “administrative Rulemaking, Guidance, and Enforcement Procedures,” which sets forth a revision and update of DOT’s existing regulations on administrative procedures. The new procedures are intended to “increase transparency, provide for more robust public participation, and strengthen the overall quality and fairness of the Department’s administrative actions.”

The final rule consolidates three previously issued DOT directives on internal administrative procedures in one location: 1) a [departmental order](#) titled “Policies and Procedures for Rulemakings,” 2) a [General Counsel memorandum](#) titled “Review and Clearance of Guidance Documents,” and 3) a [General Counsel memorandum](#) titled “Procedural Requirements for DOT Enforcement Actions.” The [departmental order](#) issued on December 20, 2018 set forth policies and procedures governing the development and issuance of regulations by the Department. It codified some of the longstanding regulatory principles presented in EO 12866, including consideration of the need of agency action and reasonable alternatives other than regulation. Notably, the final rule outlines the structure, membership, and responsibilities of the Regulatory Reform Task Force established by [EO 13777](#) in the development and review of regulations.

On the same day in 2018, DOT issued a [memorandum](#) that clarified and updated its process for the review and clearance of guidance documents. By codifying the memorandum, the final rule responds to [EO 13891](#) on “Promoting the Rule of Law Through Improved Agency Guidance Documents.” It incorporates the requirements found in the executive order for issuing guidance

documents, including a requirement that the comment period for significant guidance documents must be at least 30 days, with certain exceptions. The final rule also responds to [EO 13892](#) by codifying another [memorandum](#) signed by the General Counsel in February 2019 that clarified the procedural requirements governing the Department’s administrative enforcement proceedings and judicial enforcement actions.

The final rule is remarkable as it acts as a vanguard in [codifying regulatory principles and requirements](#) presented in executive orders. In some places, it goes further than existing requirements. For example, it establishes “enhanced rulemaking procedures” for regulations designated as “economically significant” and “high-impact,”¹ such as advance notices of proposed rulemakings and formal hearings. In addition, it requires that a notice of proposed rulemaking for an economically significant or high impact rule includes “a discussion explaining an achievable objective for the rule and the metrics by which [DOT] will measure progress toward that objective.” In short, these procedures would persist even if the executive orders were revoked.

7. Limits on SNAP Work Requirement Waiver

On December 5, the U.S. Department of Agriculture (USDA) [finalized its rule](#) revising work requirement waivers for able-bodied adults without dependents (ABAWD) in order to receive Supplemental Nutrition Assistance Program (SNAP) benefits (also known as food stamps). The [Food and Nutrition Act of 2008](#), as amended, limits the amount of time an ABAWD can receive SNAP benefits to 3 months in a 36-month period, unless the individual works or participates in certain work programs half-time or more. Under the current regulations, state agencies can apply to USDA to temporarily waive the time limit and work requirement for ABAWDs “in areas that have an unemployment rate of over 10 percent or a lack of sufficient jobs.” State agencies also have a limited number of percentage exemptions that can be used to extend SNAP eligibility for ABAWDs subject to the time limit. The final rule updates the current regulations by revising the conditions under which USDA would waive the work requirement and sets a limit on the carryover of state discretionary exemptions.

In response to [EO 13828](#) on “Reducing Poverty in America by Promoting Opportunity and Economic Mobility,” the rule reflects USDA’s efforts to limit eligibility for SNAP work requirements in order to “encourage participants to take proactive steps toward long-term self-sufficiency.” The rule removes and revises several standards for evidence of a lack of sufficient jobs from the core criteria for meeting a work requirement waiver. For example, the rule establishes a 6 percent unemployment rate floor for the original standard that an area has “an

¹ Economically significant rulemakings are defined as those rules that would result in a total annualized cost on the U.S. economy of \$100 million or more, or a total net loss of at least 75,000 full-time jobs in the United States over 5 years. High-impact rulemakings would result in a total annualized cost on the U.S. economy of \$500 million or more, or a total net loss of at least 250,000 full-time jobs in the United States over 5 years.

average unemployment rate at least 20 percent above the national average for a recent 24-month period,” meaning that no area with an unemployment rate below 6 percent would be eligible for a waiver.

Since USDA issued the [advance notice of proposed rulemaking](#) in February 2018, the rulemaking has received substantial attention from a broad range of stakeholders. The [proposed rule](#) published on the Federal Register on February 1, 2019 received nearly 100,000 comments. Scholars also hold different views about the finalized changes. For example, scholars at the American Enterprise Institute (AEI) [argue](#) that there is evidence that states have abused the waiver process to exempt ABAWDs, even during good economic times, and thus the rule “limit[s] waivers to areas with real concerns about the strength of the labor market, which is consistent with the law’s original intent.” In contrast, researchers from the Brookings Institution [show](#) that the final rule “limits the flexibility of states to use waivers in response to indicators of an economic weakness” and makes it “harder to combat future recessions.” As RSC research professor Bridget Dooling [points out](#), whether people view this regulatory change as a step in the right or wrong direction, the agency’s [regulatory impact analysis](#) is open for the public’s scrutiny.

8. Public Charge Rule Finalized but not Implemented

On August 14, the U.S. Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (DHS) [finalized](#) a rule it [proposed](#) in October 2018. The final rule prescribes how the agency will determine whether an alien applying for admission or adjustment of status is inadmissible to the United States based on the likelihood that he or she will at any time become a public charge. The public charge ground of inadmissibility was established by the [Immigration and Nationality Act](#) in 1882, but the law does not define the term “public charge.” The rule clarifies the agency’s interpretation of “public charge” to mean “an alien who receives one or more designated public benefits for more than 12 months in the aggregate within any 36-month period” and expands the concept of “public benefits” to include non-cash benefits such as SNAP and Medicaid. The rule also explains the factors DHS will consider in determining whether an alien is likely to become a public charge. Those factors include weighted negative and positive factors related to age, health, employment family status, financial status, and education and skills, but the determination will be based on the totality of the circumstances.

Relatedly, the State Department issued an [interim final rule](#) on October 11 to align its standards with DHS’s public charge rule. The interim final rule prescribes how consular officers will determine whether to approve an alien’s application for a visa based on the likelihood that the individual will become a public charge.

Some scholars [believe](#) that the public charge rule will make “it easier for immigration officials to deny applications for permanent residency (green cards) or temporary visas to immigrants they

deem ‘more likely than not’ to become a public charge.” Others [expect](#) that it will “discourage benefit collection by noncitizens already in the US.” The rule was scheduled to take effect on October 15, 2019. However, in lawsuits against the rule after it was finalized, federal courts issued a nationwide [preliminary injunction](#) against implementation of the rule. DHS [appealed](#) in December, and no court decisions had been announced and DHS [remained bound](#) by injunctions when this *Insight* was written.

9. Changes to Endangered Species Act regulations

In August, the Fish and Wildlife Service (FWS) and the National Oceanic and Atmospheric Administration (NOAA) finalized three rules revising their regulations that implement the Endangered Species Act of 1973 (ESA), as amended. The three rules entail a number of changes related to the [procedures and criteria used for listing endangered and threatened species and designating critical habitat](#), [prohibitions for activities involving threatened species](#), and [interagency cooperation procedures](#).

In the corresponding proposed rules published on July 25, 2018, the agencies state that the regulatory changes address comments they received from the public in response to the regulatory reform dockets established as part of implementing [EO 13777](#). In the first rule, FWS and NOAA clarify and modify some of the standards for listing, delisting, and reclassifying species, along with provisions for critical habitat designations. In the second rule, FWS removes its regulation under section 4(d) of the ESA that automatically extends most of the prohibitions for activities involving endangered species to threatened species. The third rule modifies the regulations that require other agencies to consult with FWS and NOAA to ensure that their action does not “jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species.” Notably, the finalized changes are prospective standards only, so no previously completed listing or designation will be reevaluated based on the new regulations.

These regulatory changes received [criticism](#) from environmentalists, who [assert](#) that the new regulations will put thousands of species in danger of extinction. Nevertheless, an [analysis](#) conducted by the Environmental Policy Innovation Center concludes that most of the changes will have negligible effects on conservation or the effects depend on how the agencies implement the regulations.

10. Initiatives on Healthcare Price Transparency

The administration also pursued initiatives to enhance healthcare price transparency. In May, the Centers for Medicare and Medicaid Services (CMS) [finalized](#) its rule on drug pricing transparency, which requires direct-to-consumer (DTC) television advertisements of prescription drugs and biological products covered by Medicare or Medicaid to include the list price of the

drug or product. The agency states that the rule will provide patients with relevant information such that they can make informed decisions to minimize their medical costs. However, critics contend that the rulemaking [exceeds](#) the authority Congress provided to CMS and [lacks](#) an enforcement mechanism.

On June 24, President Trump issued [EO 13877](#) on “Improving Price and Quality Transparency in American Healthcare to Put Patients First.” The executive order requires agencies to issue policies to inform patients about actual prices, to improve reporting of data and quality measures across healthcare programs, and to increase access to healthcare information. In response to the executive order, CMS issued two rules in November 2019. First, CMS [finalized](#) a rule that requires hospitals to disclose their standard charges for the items and services they provide, including the gross charge and the price they negotiate with insurers for each item or service. The second is a [joint rulemaking](#) on transparency in coverage by CMS, the Internal Revenue Service, and the Employee Benefits Security Administration of the Department of Labor. The agencies proposed requirements for group health plans and health insurance issuers to disclose cost-sharing information to participants, beneficiaries, and enrollees, which would help them estimate their out-of-pocket expenses. These rulemakings reflect the administration’s priorities in healthcare reform, and more regulatory actions are expected in 2020.