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The Section's 2021 Year in Review

Rulemaking Developments in 2021

Bethany Davis Noll & Bridget C.E. Dooling***

As the pandemic grinds on, 2021 brought rulemaking developments from all three branches. Newly inaugurated President Biden issued several directives in the early days of his presidency articulating this administration's regulatory policy. Some of those directives have already seen court challenges. Many more are awaiting implementation and likely judicial review. In the meantime, several Trump-era rules were adjudicated. In Congress, three Trump-era rules were disapproved under the Congressional Review Act (CRA) and other regulation-related bills were introduced but not enacted.

BETHANY DAVIS NOLL

BRIDGET C.E. DOOLING

Administrative Developments

We began 2021 with the final weeks of the Trump Administration. A couple of last-minute actions were executive orders (EOs) related to regulation. First, EO 13,980, "Protecting Americans from Overcriminalization Through Regulatory Reform," restricted the content of regulations with criminal consequences. Second, EO 13,979, "Ensuring Democratic Accountability in Agency Rulemaking," required "senior appointees" to sign newly issued regulations. Both were revoked in the first few weeks of the Biden Administration. On his first day in office, President Biden also issued EO 13,992, which revoked Trump's signature regulatory policy directing agencies to offset new regulations with deregulatory actions and imposing a regulatory budget. Moreover, EO 13,992 revoked a handful of other Trump orders, including those related to guidance documents.

On day one, the Biden Administration also initiated several major regulatory actions. The first was the routine regulatory freeze memo from the president's chief of staff directing agencies to stop sending new rules to the *Federal Register*, absent an emergency, until they could be reviewed by a Biden Administration appointee and ordering agencies to pull back rules that had been sent but not yet published. President Biden issued a memorandum entitled "Modernizing Regulatory Review," which reaffirmed longstanding, bipartisan regulatory policy while also directing the Office of Management and Budget (OMB) to develop a sweeping set of recommendations to update the regulatory process and analytical requirements for new rules. The president also issued an historic number of EOs in the early days of his administration, directing agencies to take regulatory actions to address health and economic aspects of the pandemic, climate, racial equity and justice, and immigration, among other issues. The agencies began work on these directives in 2021, which are ongoing in 2022.

At the time of writing, the president had still not announced a nominee to be the administrator of the Office of Information and Regulatory Affairs (OIRA). This broke from prior administrations, which have all nominated an administrator by the spring of the first year, with confirmed administrators serving by the first summer.

In July 2021, OMB issued a report on methods to assess equity in regulation as part of its response to Executive Order 13,985, "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government." This study followed a period of public comment on these issues and defines key terms including "equity" and "underserved communities."[1] It also summarizes methods to assess equity, along with an acknowledgement that equity assessment "remains a nascent and evolving science and practice."

The administration also took steps to address the role of guidance documents in agency decisionmaking. In July 2021, Attorney General Merrick Garland issued a memo on Department of Justice guidance documents.[2] This revoked two

* Executive Director at the State Energy and Environmental Impact Center and Adjunct Professor at NYU School of Law.

** Research Professor at the George Washington University Regulatory Studies Center.

[1] *See* OMB, *Study to Identify Methods to Assess Equity: Report to the President* (July 2021), https://www.whitehouse.gov/wp-content/uploads/2021/08/OMB-Report-on-E013985-Implementation_508-Compliant-Secure-v1.1.pdf.

[2] Memorandum from Merrick Garland, Attorney General, to All Heads of Departments (July 1, 2021), https://www.justice.gov/opa/page/file/1408606/download.

Trump Administration memos that limited the Department's issuance of guidance documents and their use in enforcement proceedings. The Garland memo notes that guidance is not binding and that departmental guidance should be clear on that point, but that guidance can be persuasive and therefore part of enforcement proceedings when appropriate.

Judicial Developments

Vacating Trump-Era Rules

One theme this year was the Biden Administration conceding error in challenges to Trump-era rules and courts vacating those rules. First, in Montana, a district court vacated the so-called "Secret Science" rule—a rule that prohibited the Environmental Protection Agency (EPA) from promulgating rules justified by epidemiological studies showing the adverse health effects of contaminants unless the studies' underlying data were publicly disclosed. The Trump-era EPA justified the rule as a procedural rule that was allowable under the Federal Housekeeping Statute. But the court held that the rule violated that statute because it was not procedural. *See* Order at 2, Env't Def. Fund, No. 21-00003 (D. Mont. Feb. 1, 2021).

Second, in the U.S. Court of Appeals for the D.C. Circuit, the Biden Administration asked the court to vacate the Trump Administration's delay of methane emissions restrictions for landfills. That delay was based on deadlines that were set out in the Affordable Clean Energy (ACE) rule—the Trump administration's repeal of Obama-era restrictions on greenhouse gas emissions from existing power plants. After ACE was vacated in a separate ruling, the agency asked for remand and vacatur of the delay on the grounds that the separate ruling found the deadlines to be invalid. The court agreed in a one-line order. *See* Order, Env't Def. Fund, No. 19-1222 (D.C. Cir. Apr. 5, 2021) (per curiam). (More on ACE later.)

Third, also in the D.C. Circuit, the court vacated the Trump Administration's rule setting a higher threshold for determining whether greenhouse gas emissions from a point source contribute significantly to dangerous air pollution, and are therefore subject to stricter regulatory requirements. The court vacated the rule for failure to meet notice-and-comment requirements. *See* California v. EPA, No. 21-1035 (D.C. Cir. Apr. 5, 2021) (per curiam).

Finally, the U.S. District Court for the Northern District of California held that the Trump Administration rule restricting state authority to enforce their water quality standards violated the Clean Water Act. *See* In re Clean Water Act Rulemaking, 2021 WL 4924844 (N.D. Cal. 2021), appeal filed (9th Cir. 21-16958). The Biden Administration identified significant problems with the rule, but it asked for remand without vacatur. Nonetheless, after plaintiffs (including the injured states) opposed that request, the court vacated the rule, citing "serious deficiencies."

Substantial Evidence, Environmental Review, and Arbitrary and Capricious Review

Cases upholding Trump-era rules touched on a trio of doctrines that all consider the adequacy of an agency's review. In *Labor Council for Latin American Advancement v. EPA*, 12 F.4th 234 (2d Cir. 2021), the court reviewed an EPA finding that the use of methylene chloride for consumer paint was unreasonably dangerous, but that commercial uses could continue. The court rejected a number of arguments against EPA, including an argument that EPA's decision to assess qualitatively, rather than quantitatively, the costs imposed on retailers.

In a second case, the U.S. Court of Appeals for the Ninth Circuit upheld the Federal Aviation Administration's environmental review of a new Amazon hub at the San Bernardino International Airport Authority. The majority rejected arguments about the cumulative impact and health harms that the additional truck traffic would bring to an area that is in the nation's most polluted air basin. In dissent, Judge Johnnie Rawlinson asserted that the case "reeks of environmental racism" as the area for the project is "populated overwhelmingly by people of color" and already experiencing high levels of pollution due to longstanding inequities and racist policies. *See* Ctr. for Cmty. Action & Envtl. Justice v. FAA, 18 F.4th 592, 614 (9th Cir. 2021). Just after the new year, petitioners sought rehearing.

And in the spring, the Supreme Court upheld the Federal Communications Commission's Trump-era decision to eliminate rules meant to boost minority and female ownership levels in the media. *See* FCC v. Prometheus Radio Project, 141 S. Ct. 1150 (2021). The Court deferred to the agency's prediction that the rollback would not harm those levels, finding that the agency's decision to dismiss studies showing harm was simply a decision to interpret the studies differently.

Biden-Era Rules

There is already significant action on the Supreme Court's "shadow docket" concerning Biden-era rules. In one case, the Court blocked the Biden Administration's decision rolling back the Migrant Protection Protocols, also known as the "remain in Mexico" rule. The Court

explained that the government had "failed to show a likelihood of success on the claim that the memorandum rescinding the Migrant Protection Protocols was not arbitrary and capricious." *See* Biden v. Texas, No. 21A21 (Aug. 24, 2021 U.S.S.C.). In another case, the Court allowed a lower court order vacating the CDC's Eviction Moratorium to go into effect, holding that the CDC had attempted to exert a "breathtaking amount of authority" without the necessary specific authority. *See* Alabama Association of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021).

A series of cases raised challenges the Occupational Safety and Health Administration (OSHA) emergency temporary standard, which sought to require large businesses to implement vaccine-or-test requirements for their employees. In one lower-court case, the Fifth Circuit stayed the rule after referring to OSHA as an agency "in the deep recesses of the federal bureaucracy," and holding that OSHA was not authorized "to make sweeping pronouncements on matters of public health affecting every member of society in the profoundest of ways." *See* BST Holdings, L.L.C. v. Occupational Safety and Health Administration, 17 F.4th 604 (5th Cir. 2021). After the Sixth Circuit vacated the Fifth Circuit's stay, the Supreme Court heard argument and granted a new stay. *See* Nat'l Fed'n Indep. Bus. v. DOL, 595 U.S. ___ (2022). The Court found that the vaccine rule was "a significant encroachment into the lives—and health—of a vast number of employees." The Court then held that OSHA only had authority to issue workplace rules, "not broad public health measures." A deeper discussion of the impact of these cases will have to await next year's installment.

Lower courts also heard challenges to steps that the Biden Administration had taken on environmental priorities. In Missouri, a district court dismissed a challenge to the Biden Administration's decision to use an interim value for the social cost of carbon—an estimate of the monetary damages for each additional ton of greenhouse gas emissions. The court held that plaintiffs did not have standing because the alleged injury "is from hypothetical future regulation possibly derived from" the social cost of carbon estimates. *See* Missouri v. Biden, 2021 WL 3885590 (E.D. Mo. 2021), appeal filed (8th Cir. 21-03013).

In Louisiana, a district court enjoined the Biden Administration's decision to pause new oil and gas leases on public lands or offshore while it conducted a review of the environmental impacts. The court held that plaintiffs had a likelihood of success in showing that the two relevant statutes had not authorized the agency "to pause lease sales." In addition, the court found that states had shown standing through the "normal inquiry" and as a result of the "special solicitude" found in Massachusetts v. EPA. *See* Louisiana v. Biden, 2021 WL 2446010 (W.D. La. 2021), appeal filed (5th Cir No. 21-30505).

What Is to Come

Back to the ACE rule. One day before President Biden's inauguration, the D.C. Circuit vacated ACE. The court held that the Trump Administration had fundamentally misconstrued the Clean Air Act in stating that the Clean Power Plan was outside of the agency's authority. *See* Am. Lung Ass'n v. EPA, 985 F.3d 914 (D.C. Cir. 2021). The Biden Administration has said it would not enforce ACE and that it was seeking to rewrite it. But in November 2021, the Supreme Court granted intervenors' petitions for certiorari. The case sounds several of the notes that have been percolating all year. West Virginia's "question presented" calls Section 111(d), the provision that EPA applied in the Clean Power Plan, an "ancillary provision of the Clean Air Act," and the state argues that the D.C. Circuit's decision must be vacated because it gives EPA authority to "resolve questions of vast political and economic importance without a clear textual statement." Again, news about the impact of this case will need to wait until next year.

Legislative Developments

The 117th Congress began in January 2021. The new Congress considered several resolutions of disapproval to revoke regulations under the CRA. Congress passed three resolutions to disapprove rules issued during Trump Administration, one each from the Equal Employment Opportunity Commission, the Environmental Protection Agency, and the Office of the Comptroller of the Currency. While Republican presidents have signed regulatory disapprovals into law in the past, this was the first time the tool has been used by a Democratic president.

Several bills related to regulation were introduced in the 117th Congress, but none of them were enacted in 2021. The Administrative Conference of the United States continues to offer a helpful legislative summary on its website.[3]

[3] *See* ACUS, Summary of Recent Administrative Law Reform Bills, https://www.acus.gov/research-projects/summary-recent-administrative-law-reform-bills.

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AMERICAN BAR ASSOCIATION
1050 CONNECTICUT AVENUE NW, SUITE 400
WASHINGTON, DC 20036

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Administrative Law and
Regulatory Practice Section