

Week in Regulation



Billion-dollar Week Trend Continues Apace: October 16 – 20

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While last week was a relatively busy one in the pages of the Federal Register, there were no significant actions that added costs. There were 10 rulemakings with some measurable economic impact, but in each case there were no added burdens.

REGULATORY TOPLINES

- Proposed Rules: 34
- Final Rules: 49
- 2023 Total Pages: 72,562
- 2023 Final Rule Costs: \$118.2 billion
- 2023 Proposed Rule Costs: \$494.4 billion

NOTABLE REGULATORY ACTIONS

The most significant rulemaking of the week was the Environmental Protection Agency (EPA) [rule](#) “Finding That Lead Emissions From Aircraft Engines That Operate on Leaded Fuel Cause or Contribute to Air Pollution That May Reasonably Be Anticipated To Endanger Public Health and Welfare.” As the title suggests, the rule is a finding that the lead air pollution from certain aircraft may reasonably be anticipated to endanger the public health and welfare within the meaning of the Clean Air Act.

Specifically, the EPA is identifying general aviation as the source of lead pollution: “Covered aircraft in this context means all aircraft and ultralight vehicles equipped with covered engines. Covered aircraft would, for example, include smaller piston-engine aircraft such as the Cessna 172 (single-engine aircraft) and the Beechcraft Baron G58 (twin-engine aircraft), as well as the largest piston-engine aircraft such as the Curtiss C-46 and the Douglas DC-6. Other examples of covered aircraft would include rotorcraft, such as the Robinson R44 helicopter, light-sport aircraft, and ultralight vehicles equipped with piston engines.”

These final findings do not constitute a regulation of general aviation. Instead, if the EPA finalizes the findings, it will be subject to a duty to propose and promulgate emission standards for this class of aircraft. Those rulemakings would then impose costs on those entities outside the federal government.?

Another notable action this week was the Center for Medicare and Medicaid Services (CMS) issuing three rules covering the calendar year 2024 [inpatient deductible and coinsurance](#) amounts, [Part A premiums for the uninsured aged](#), and [Part B premium amounts and deductibles](#), respectively. Again, these important decisions impose no new burdens or paperwork hours.

TRACKING THE ADMINISTRATIONS

The Biden Administration reliably stands in contrast to the Trump Administration and has thus far topped the Obama Administration in the pace of imposing costs on the private sector. Since the AAF RegRodeo data extend back to 2005, it is possible to provide weekly updates on how the top-level trends of President Biden's regulatory record track with those of his two most recent predecessors. The following table provides the cumulative totals of final rules containing some quantified economic impact from each administration through this point in their respective terms.

TRACKING THE ADMINISTRATIONS

REGULATORY ACTIVITY FROM INAUGURATION DAY TO OCTOBER 20th (Year 3)

	FINAL RULES	FINAL RULE COSTS	PAPERWORK HOURS
BIDEN 2021	731	\$436.3B	220.5M
TRUMP 2017	783	\$21.9B	61.2M
OBAMA 2009	1012	\$264.8B	164.8M

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Due to the final rules discussed above, there were no real shifts in the Biden Administration’s to-date regulatory totals. During the comparable period, however, the Trump Administration was reducing regulatory costs by \$23 billion, while the Obama Administration was adding \$10 billion to its total.

THIS WEEK’S REGULATORY PICTURE

A notable feature of the Fiscal Responsibility Act (FRA) – the legislation that ended the debt ceiling standoff earlier in 2023 – was the inclusion of the Administrative Pay-As-You-Go Act of 2023 (the “Act”). The notion was that if an executive action produced mandatory spending – the poster child for this was President Biden’s proposed student loan forgiveness that the Supreme Court invalidated – there would have to be another action that would produce a budgetary offset. There was never much hope that the Act would meaningfully control spending. It expires at the end of 2024, and even when in effect, the director of the Office of Management and Budget (OMB) could waive the requirement if “necessary for the delivery of essential services” or “necessary for effective program delivery.”

Nevertheless, in September, OMB issued the implementation [guidelines](#) for the Act. A notable feature of the implementation is that not all increases in direct spending are treated equally. First, there are exemptions for *de minimis* increases. More interesting, “if the agency determines that it is required by law to issue a rule, but that the law leaves the agency with discretion to determine how to effectuate that legal requirement, the agency must, to the extent practicable, ascertain the least costly implementation option that is ‘reasonably identifiable’ and measure the direct spending increase of the rule against that least costly implementation option.”

In other words, if the agency chooses the lowest-cost option – no matter what it costs – no offset is needed. If it chooses an expensive implementation, only the extra expense must be offset. But it gets even better: “Whether a rule is ‘required by law’ for purposes of section 262(7)—and, if so, whether there are reasonably identifiable, less-costly implementation options—are case-by-case determinations that are made by the agency, in consultation with agency counsel.” In other words, the agency gets to be judge and jury as to whether to use this exemption.

The bottom line? It does not look like the Act will deter much direct spending from executive actions.