Week in Regulation

Electric Motor Efficiency Rule Stands Out From Otherwise Ho-hum Week

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In terms of the volume of regulatory activity, last week was a modestly busy one in the pages of the Federal Register. There were 16 rulemakings with some measurable economic impact. Half of these, however, were relatively routine airworthiness directive rules, and only one rule crossed the billion-dollar threshold. That rulemaking was a proposed rule from the Department of Energy (DOE) regarding efficiency standards for certain electric motors. Across all rulemakings, agencies published $6 billion in total costs and added 369,968 annual paperwork burden hours.

REGULATORY TOPLINES

- Proposed Rules: 31
- Final Rules: 51
- 2023 Total Pages: 87,198
- 2023 Final Rule Costs: $119.1 billion
- 2023 Proposed Rule Costs: $571.3 billion

NOTABLE REGULATORY ACTIONS

The most consequential rulemaking of the week in terms of costs was a DOE proposal on "Energy Conservation Program: Energy Conservation Standards for Expanded Scope Electric Motors." As the title suggests, the agency seeks to establish a new set of efficiency standards for certain kinds of motors. One may wonder, what is an "expanded scope electric motor"? According to the rulemaking's "Technical Support Document," DOE considers the following criteria:

> For this NOPR, DOE created six equipment class groups based on various motors characteristics. These characteristics include: motor topology (i.e., CSCR/CSIR/split phase (high and medium-torque ESEMs), PSC/shaded pole (low-torque ESEMs), or polyphase), standard horsepower ratings (i.e., standard ratings from .25 to 3 horsepower), pole configurations (i.e., 2-, 4-, 6-, or 8-pole), enclosure types (i.e., open or enclosed), and cooling requirements (i.e., air-over or non-air-over). DOE's resulting equipment class groups are: ESEMs with CSCR, CSIR, or split phase topology, ESEMs with PSC or shaded pole topology, polyphase ESEMs, AO-ESEMs with CSCR, CSIR, or split phase topology, AO-ESEMs with PSC or shaded pole topology, and polyphase AO-ESEMs. Within each of these ECGs, DOE uses combinations of other pertinent motor characteristics to enumerate its individual equipment classes. All equipment class groups presented in this NOPR have a horsepower rating within the range of .25-3 hp, can have pole configurations of 2-, 4-, 6-, or 8-pole, and can have open or enclosed enclosure types. Table 3.2.1 presents the equipment class groups considered for this rulemaking.

The answer – in short, for those not involved in the business of motor engineering – is a subset of electric motors that the agency has heretofore not explicitly covered under its efficiency rulemakings. DOE estimates that updating the design and construction of such motors will total "Incremental Product Costs" of approximately $5.1 billion over a 30-year period.

TRACKING THE ADMINISTRATIONS

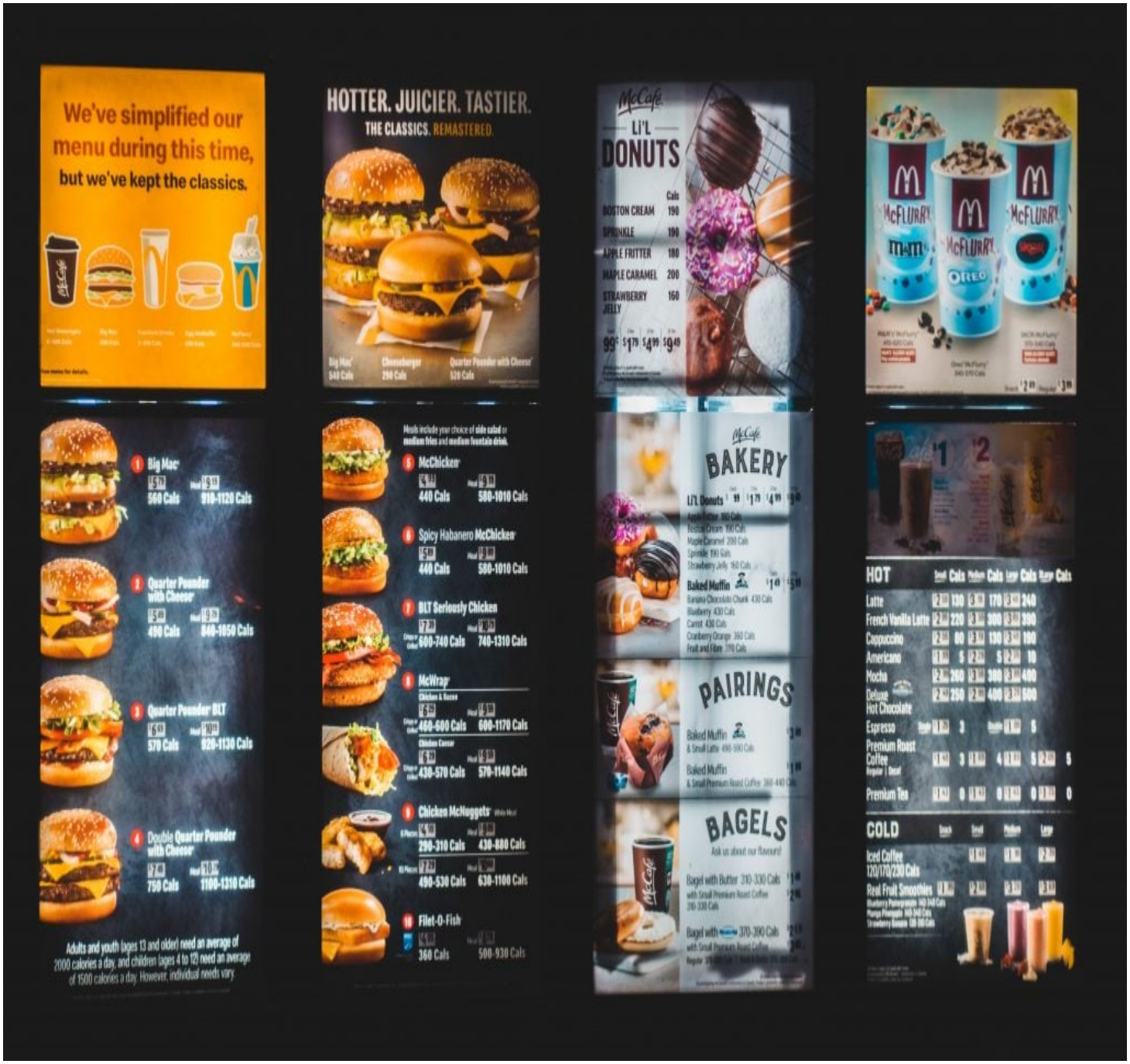
As we have already seen from executive orders and memos, the Biden Administration will surely provide plenty of contrasts with the Trump Administration on the regulatory front. And while there is a general expectation that the current administration will seek to broadly restore Obama-esque regulatory actions, there will also be areas where it charts its own course. 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.

While the most significant action happened on the proposed rule side of the ledger last week, there was still some noticeable movement in the Biden Administration's final rule totals. Biden-era costs and paperwork creeped up by $449 million and 370,000 hours, respectively. A Department of Labor rule regarding "Nondisplacement of Qualified Workers Under Service Contracts" was the main reason for these increases. Meanwhile, across the other two administrations, there were diverging trends. The Trump Administration saw a reduction in costs of $90 million and nearly 820,000 hours of paperwork. A rule reducing administrative

burdens for certain federal contractors was the driver of these cuts. In contrast, the Obama Administration saw costs increase by nearly $360 million, with a rule implementing the “Consumer Operated and Oriented Plan” program under the Affordable Care Act being the main reason for that increase.

THIS WEEK’S REGULATORY PICTURE

Last week, the Food and Drug Administration (FDA) released further “guidance” on the menu-labeling rules it finalized years ago.



Source: Photo by Erik Mclean on Unsplash

Last Thursday, FDA published a "Notice of Availability" regarding "Menu Labeling: Supplemental Guidance for Industry (Edition 2)." While the document is categorized as a "proposed rule" for Federal Register purposes, it is actually an announcement that the agency has produced a separate guidance document. In this case, FDA apparently has some further clarifications for the menu-labeling rule for certain kinds of restaurants that it finalized back in 2014 under the auspices of the Affordable Care Act. While these "clarifications" seem rather mundane, they do also present a potentially useful case study on the practice of agency guidance and issues involved therein.

This current draft guidance document is relatively simple and straightforward. It seeks to address only two issues. First, it asks if "covered establishments" (generally defined as chain restaurants with at least 20 branches) ought to provide the relevant menu-labeling information when listing their products on a third-party platform (TPP). Second, it asks if such establishments should also list information on "added sugars" – a requirement imposed in recent years on packaged food products but not technically these restaurant-produced ones. For both issues, FDA encourages these covered establishments to provide such information.

Such issues may seem relatively simple on their face, but they each involve some potential substantive questions. Additionally, this document provides a helpful example of the regulatory gray area that agency guidance can sometimes occupy in the rulemaking process. While the document itself is not necessarily "legally enforceable," its very existence suggests an agency preference on the matters at hand that may lead to uneven oversight and enforcement for regulated entities.

To the first issue – the TPPs – the most obvious questions that arise involve the degree and manner of responsibility for the directly covered establishment versus the TPP they work with. How would FDA view a covered establishment that sought to list the relevant information on a TPP, but that platform either could not or would not sufficiently follow the establishment's wishes? What if the TPP lists outdated or incorrect information, even if it has done so in good faith?

To the second issue – the added sugars – the questions here largely mirror those raised during the implementation of the *required* labeling standards rulemaking. As the original menu-labeling rule's economic analysis made clear, there is an often not-insubstantial cost to testing a given product for certain nutritional attributes and duly posting the results. What does that look like in practice for the covered establishments on the added sugars front? And even if it is not technically *required*, will there be some informal difference in how FDA treats establishments that volunteer this information versus those that do not?

Since this is only a draft guidance, one presumes that relevant stakeholders will work on addressing these issues. Interested parties have until February 12, 2024, to submit comment on the matter.

TOTAL BURDENS

Since January 1, the federal government has published $690.4 billion in total net costs (with $119.1 billion in new costs from finalized rules) and 203 million hours of net annual paperwork burden increases (with 19.8 million hours in coming from final rules).


Year
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2023
2022
2021
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2006
2005
Total Number of Regulations Finalized
226
Total Finalized Cost
$119.1b
Paperwork Hours
19,768,580