Week in Regulation

End of October Sees Major Changes to Trump-Era Regulations

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As October 2021 came to a close, the most notable items in the pages of the Federal Register were a pair of rulemakings seeking to seriously amend or rescind rulemakings produced at the tail-end of 2020. The Department of Labor (DOL) published a final rule that withdraws one portion of a Trump-era rule on the matter and amends another. Meanwhile, the Department of Health & Human Services (HHS) put forward its proposal to repeal the "Securing Updated and Necessary Statutory Evaluations Timely" (SUNSET) rule. Across all rulemakings, agencies published $1.4 billion in total net costs but had no measurable change in annual paperwork burden hours.

REGULATORY TOPLINES

- Proposed Rules: 61
- Final Rules: 58
- 2021 Total Pages: 60,061
- 2021 Final Rule Costs: $15.4 billion
- 2021 Proposed Rule Costs: $185.5 billion

NOTABLE REGULATORY ACTIONS

The most significant rulemaking of the week from an economic impact perspective was DOL's final rule entitled "Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal." The rule marks another instance of the Biden Administration revisiting and revising the regulations published under the Trump Administration that amended the employer-employee relationship in jobs that involved a tipped wage. As the rule's summary puts it, "Specifically, the Department is amending its regulations to clarify that an employer may only take a tip credit when its tipped employees perform work that is part of the employee's tipped occupation." DOL estimates that this would represent a sizeable wage transfer from employers to employees and cost affected entities roughly $1.8 billion over 10 years due to "rule familiarization costs, adjustment costs, and management costs."

Another, more dramatic, instance of reversing Trump-era rulemakings came from HHS's proposed rule regarding "Securing Updated and Necessary Statutory Evaluations Timely; Proposal To Withdraw or Repeal." The SUNSET rule was a Trump Administration measure that would have set an expiration date on HHS regulations if agency staff did not actively conduct a retrospective review of those regulations' cost-benefit analyses in a timely fashion. Further details on the original SUNSET rule can be found here. In case the title doesn't spell it out clearly enough, this proposal seeks "to withdraw or repeal the SUNSET final rule in its

entirety." As part of its justification, HHS estimates that this rulemaking would save "the public" roughly $402 million (on average) over the next decade in terms of avoided opportunity costs from not having to provide input on the SUNSET rule's review proceedings.

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 new 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.

TRACKING THE ADMINISTRATIONS

REGULATORY ACTIVITY FROM INAUGURATION DAY TO OCTOBER 29th

	FINAL RULES	FINAL RULE COSTS	PAPERWORK HOURS
BIDEN 2021	180	$14.8B	43.6M
TRUMP 2017	175	$8B	1.7M
OBAMA 2009	235	$30.1B	18.8M

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With DOL's latest tip rule, the Biden final rule cost tally shot up significantly. There was, however, not as much movement on the cost front from either the Trump or Obama Administrations around this point in their respective tenures. Rather, there were some notable shifts in the paperwork column. Interestingly, the prime drivers of these shifts were both Department of Education rules regarding student loans. The Trump Administration published a rule that reduced paperwork requirements by roughly 250,000 hours each year. For

Obama, it was a significant increase, due to a rule bringing 4.6 million hours of new paperwork.

THIS WEEK'S REGULATORY PICTURE

This week, the Biden Administration proposed to rescind more Trump-era environmental rules.

Via FWS

On October 27, the U.S. Fish and Wildlife Service (FWS) and the National Oceanic and Atmospheric Administration (NOAA) published a proposed rule in the Federal Register titled "Endangered and Threatened Wildlife and Plants: Listing Endangered and Threatened Species and Designating Critical Habitat." FWS separately published a related proposed rule titled "Endangered and Threatened Wildlife and Plants: Regulations for Designating Critical Habitat."

As the titles imply, the proposals pertain to the implementation of the Endangered Species Act (ESA). In tandem, the two rules would rescind changes to the ESA made under the Trump Administration last year.

The proposed rule jointly published by FWS and NOAA would rescind a 2020 rule that defined a species habitat as not including any areas that do not currently or periodically contain the requisite resources and conditions, even if such areas could meet this requirement in the future after restoration activities or other changes occur. In proposing to remove the 2020 rule, FWS and NOAA said a review of the rule as directed by an executive order from President Biden found the definition problematic because it constrained the agencies' ability to designate habitat in a manner intended by the ESA.

The FWS-only rule would rescind a similar rule pertaining to what factors FWS can consider when designating critical habitat. The 2020 rule required FWS to consider the economic, national security, and any "relevant" impacts of designating habitats and weigh those in a determination of critical habitat. Like the jointly issued proposed rule, FWS finds that the 2020 rule is counter to its duties under the ESA.

In response to the proposals, Republicans in the House of Representatives introduced legislation to codify the Trump Administration's rules. Without a majority, however, the legislation is unlikely to go anywhere.

TOTAL BURDENS

Since January 1, the federal government has published $200.9 billion in total net costs (with $15.4 billion in new costs from finalized rules) and 52.6 million hours of net annual paperwork burden increases (with 46.3 million hours in increases from final rules).