



Week in Regulation

Off-Road Vehicle Rule Highlights Up-And-Down Week

DAN GOLDBECK, DAN BOSCH | JULY 25, 2022

For the better part of last week, it looked like it would be a net cost-reduction kind of week. Three of the week's nine rulemakings with quantified economic impacts involved burden reductions in costs and/or paperwork, with a Securities and Exchange Commission (SEC) proposal leading the pack. A Consumer Product Safety Commission (CPSC) rulemaking on safety features for certain off-road vehicles flipped the week into the net-cost column, however. Across all rulemakings, agencies published \$74 million in total net costs but cut 376,598 annual paperwork burden hours.

REGULATORY TOPLINES

- Proposed Rules: 41
- Final Rules: 44
- 2022 Total Pages: 43,918
- 2022 Final Rule Costs: \$14 billion
- 2022 Proposed Rule Costs: \$84.1 billion

NOTABLE REGULATORY ACTIONS

The most significant rulemaking of the week was CPSC's [proposed rule](#) regarding "Safety Standard for Debris Penetration Hazards." In particular, the agency seeks to address the "risk of injury and death associated with debris penetration in off-highway vehicles (OHVs), including recreational off-highway vehicles (ROVs) and utility task/terrain vehicles (UTVs)." CPSC examined the range of economic impacts involved under two regulatory scenarios: one where manufacturers redesign the inherent structure of these vehicles' floorboards and one where manufacturers added a "floorboard guard" to the vehicles. CPSC estimates that present value costs under the former scenario add up to \$181.5 million and \$304.4 million under the latter. Taking the midpoint of that range yields a total cost estimate of nearly \$243 million.

The most notable cost reduction action of the week was SEC's [final rule](#) on "Proxy Voting Advice." The rule involves revisions to a set of 2020 rules on proxy voting practices. In particular:

After the Commission adopted the 2020 Final Rules, however, institutional investors and other PVAB clients continued to express strong concerns about the rules' impact on their ability to receive independent proxy voting advice in a timely manner. Furthermore, PVABs continued to develop industry-wide best practices and improve their own business practices to address the concerns that were the impetus for the 2020 Final Rules. The Commission subsequently determined that it was appropriate to reassess the 2020 Final Rules, solicit further public comment, and, where

appropriate, recalibrate the rules to preserve the independence of proxy voting advice and ensure that PVABs can deliver advice in a timely manner without passing on higher costs to their clients.

SEC estimates that, under this reassessment, it can reduce the administrative burdens involved with such issues. Per the rule's Paperwork Reduction Act analysis, these reductions amount to nearly 239,000 fewer hours of paperwork each year with \$32 million in commensurate annual cost reductions (or \$96 million total across the three-year period for which the paperwork requirements are officially approved).

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.

TRACKING THE ADMINISTRATIONS

REGULATORY ACTIVITY FROM INAUGURATION DAY TO JULY 22nd (Year 2)

	FINAL RULES	FINAL RULE COSTS	PAPERWORK HOURS
BIDEN 2021	378	\$214.9B	135.3M
TRUMP 2017	401	\$892.4M	8.4M
OBAMA 2009	538	\$165.5B	70.4M
LAST UPDATED: JULY 22 ND , 2022		AMERICANACTIONFORUM.ORG	

The SEC proxy voting rule discussed above was the only final rule for the Biden Administration last week. As such, its burden reductions lead to a slight decrease in the Biden-era totals. The Trump Administration saw its own topsy-turvy week that netted out to \$18.4 million in cost reductions but nearly 226,000 additional hours of annual paperwork. A deregulatory Department of Labor (DOL) [rule](#) clashed with a Department of Transportation [rule](#) on public transit safety measures to produce such a result. The Obama Administration saw

the most movement with roughly \$424 million in increased costs and 1.1 million additional hours of annual paperwork. A DOL [rule](#) was the primary driver of those increases.

THIS WEEK'S REGULATORY PICTURE

This week, when is a rule final?

United States Court of Appeals FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 20, 2022

Decided July 22, 2022

No. 20-5291

HUMANE SOCIETY OF THE UNITED STATES, ET AL.,
APPELLANTS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:19-cv-02458)

On July 22, the U.S. Court of Appeals for the District of Columbia ruled in a case about when a rule is considered officially on the books. In a 2-1 [decision](#), the court ruled that the Administrative Procedure Act

(APA) requires an agency to go through notice-and-comment rulemaking to repeal or withdraw a final rule once it is filed for public inspection with the Office of the Federal Register (OFR), rather than when it is actually published in the Federal Register.

When an agency finalizes a rule, it sends it to the OFR, which prepares it for publication in the Federal Register. Once it is ready to go, it is posted on the OFR's [public inspection](#) website – a lesser-known site (outside of regulatory policy aficionados) to read upcoming rules before they are published.

The conventional wisdom was that a rule is only technically final when it is officially published. Even the OFR thought so; it cautions readers on the public inspection site that “[o]nly official editions of the Federal Register provide legal notice to the public and judicial notice to the courts under [44 U.S.C. 1503 & 1507](#).” So much for that.

The case focuses on the rulemaking mechanics that occur during presidential transitions. On January 19, 2017, the Department of Agriculture's (USDA) final rule titled “Horse Protection: Licensing of Designated Qualified Persons and Other Amendments” appeared on the public inspection site to be published on January 23. On January 20, President Trump succeeded President Obama, and his new chief of staff published a memorandum implementing a regulatory freeze. This directed agencies to withdraw any rules submitted to the OFR but not yet published. The USDA withdrew the horse protection rule as directed.

A lawsuit from the Humane Society challenged the withdrawal, arguing that the rule was in fact final and, according to the APA, would need to go through the notice-and-comment process necessary to repeal a final rule. The government disagreed, arguing the long-held view that publication is what makes a rule technically on the books.

The D.C. Circuit Court, surprisingly, agreed with the Humane Society. In the majority opinion, Judge David S. Tatel cited language in the Federal Register Act of 1935 that a document “is not valid as against a person who has not had actual knowledge of it until . . . [it is] made available for public inspection.” He continued that “[m]aking a rule available for public inspection, then, provides notice to the public and carries legal consequences.”

In her dissent, Judge Neomi Rao (a former administrator of the Office of Information of Regulatory Affairs, the White House office that reviews regulations) argued that by “cutting off agency discretion at public inspection – a mere ministerial moment on the way to publication – the majority imposes a judicial burden on agency procedures that conflicts with this circuit's precedent, the statutory framework for rulemaking, and a longstanding regulation permitting withdrawals prior to publication.”

The ruling (assuming it withstands a possible appeal) will have implications for midnight rulemaking, or rules issued in the waning days of a presidential administration. Outgoing administrations will now simply have to get the rules filed with the OFR for public inspection to be final, rather than ensuring that they are fully published. The result is that incoming administrations could find it more difficult to get rid of midnight rules they oppose.

TOTAL BURDENS

Since January 1, the federal government has published \$98.1 billion in total net costs (with \$14 billion in new costs from finalized rules) and 79.3 million hours of net annual paperwork burden increases (with 4.1 million hours in increases from final rules).

