

Federal Rulemaking: Status of Actions to Offset Direct Spending from Administrative Rules

GAO-24-106968
Q&A Report to Congressional Committees

November 30, 2023

Why This Matters

The Fiscal Responsibility Act of 2023 included a provision—known as Administrative Pay-As-You-Go (PAYGO)—that requires federal agencies to identify increases in direct spending—also referred to as mandatory spending—that may result from federal rulemaking.¹ For final rules that increase direct spending above certain thresholds, agencies must identify one or more additional agency actions that could offset the direct spending associated with the rulemaking or request and receive a waiver.² The act does not legally require agencies to move forward with, or ultimately implement, proposed offsets. Since the 1990s, Congress has implemented multiple PAYGO procedures to constrain the extent to which new legislation increases the deficit.³

From fiscal years 2001 through 2021, more than 60 percent of federal spending in any given year came from direct spending. This includes spending for certain entitlement programs such as Social Security, Medicare, and Medicaid, as well as certain other payments to individuals, businesses, and state and local governments.⁴ Direct spending is generally governed by criteria contained in statutes other than annual appropriation acts. For example, spending for entitlement programs is generally governed by program eligibility criteria and benefit or payment requirements established by statute and implemented by rules promulgated by federal agencies. Those rules can be adjusted through federal agencies' administrative actions, including rulemaking.

The Fiscal Responsibility Act of 2023 includes a provision for us to report on the progress in implementing Administrative PAYGO.⁵ This report explains the Administrative PAYGO requirements and how they have been implemented.

Key Takeaways

- The Office of Management and Budget (OMB) issued guidance for implementing Administrative PAYGO requirements on September 1, 2023, that addressed the elements included in the Fiscal Responsibility Act of 2023.
- As of November 1, 2023, federal agencies have not submitted any notices or legal opinions to OMB pursuant to Administrative PAYGO requirements since the law passed in June 2023.

What steps has OMB taken to implement the act?

OMB issued guidance on September 1, 2023, that addressed the Administrative PAYGO provisions in the Fiscal Responsibility Act of 2023.⁶ The guidance describes (1) exemptions to the Administrative PAYGO requirements, (2) the process for waiving the requirements, and (3) the process for how federal

agencies are to submit information to OMB for administrative actions subject to the requirements.⁷

For rules subject to review by OMB's Office of Information and Regulatory Affairs (OIRA), OMB's guidance directs federal agencies to notify OMB of their initial determination of whether their rules will be subject to Administrative PAYGO requirements no later than the proposed rulemaking stage of the rulemaking process.⁸ When agencies submit a final rule, they are to provide a written statement confirming their initial determination.

OMB is responsible for reviewing agencies' written notices regarding their compliance with Administrative PAYGO requirements.⁹ OIRA is to receive agency statements regarding rules that agencies have determined are exempt and, according to OMB's guidance, OMB will review all agency statements regarding:

- requests for waivers, and
- written notices for rules subject to Administrative PAYGO requirements.

OMB staff told us that they will work with agencies throughout the rulemaking process to determine whether a proposed rule will be subject to Administrative PAYGO requirements. For any budget estimate, including those related to Administrative PAYGO requirements, OMB staff told us they work with agencies to discuss the assumptions and methodology used to produce the estimate. However, staff told us OMB does not replicate agencies' estimates independently.

For rules subject to Administrative PAYGO requirements, the OMB Director will review the written notices that federal agencies submit prior to finalizing the rules. As part of this review, the OMB Director will determine whether the agency has included sufficient offsets to spending. If a notice does not contain a proposal for such offsets, the OMB Director must return the notice to the agency for resubmission, which may delay finalizing the rule.¹⁰

To what extent have agencies submitted written notice to OMB for rules subject to Administrative PAYGO?

The Administrative PAYGO requirements apply to final rules that increase direct spending above certain thresholds and were published after June 3, 2023, the date of enactment. In addition, OMB's guidance applies to proposed rules submitted for OMB review after September 1, 2023.¹¹

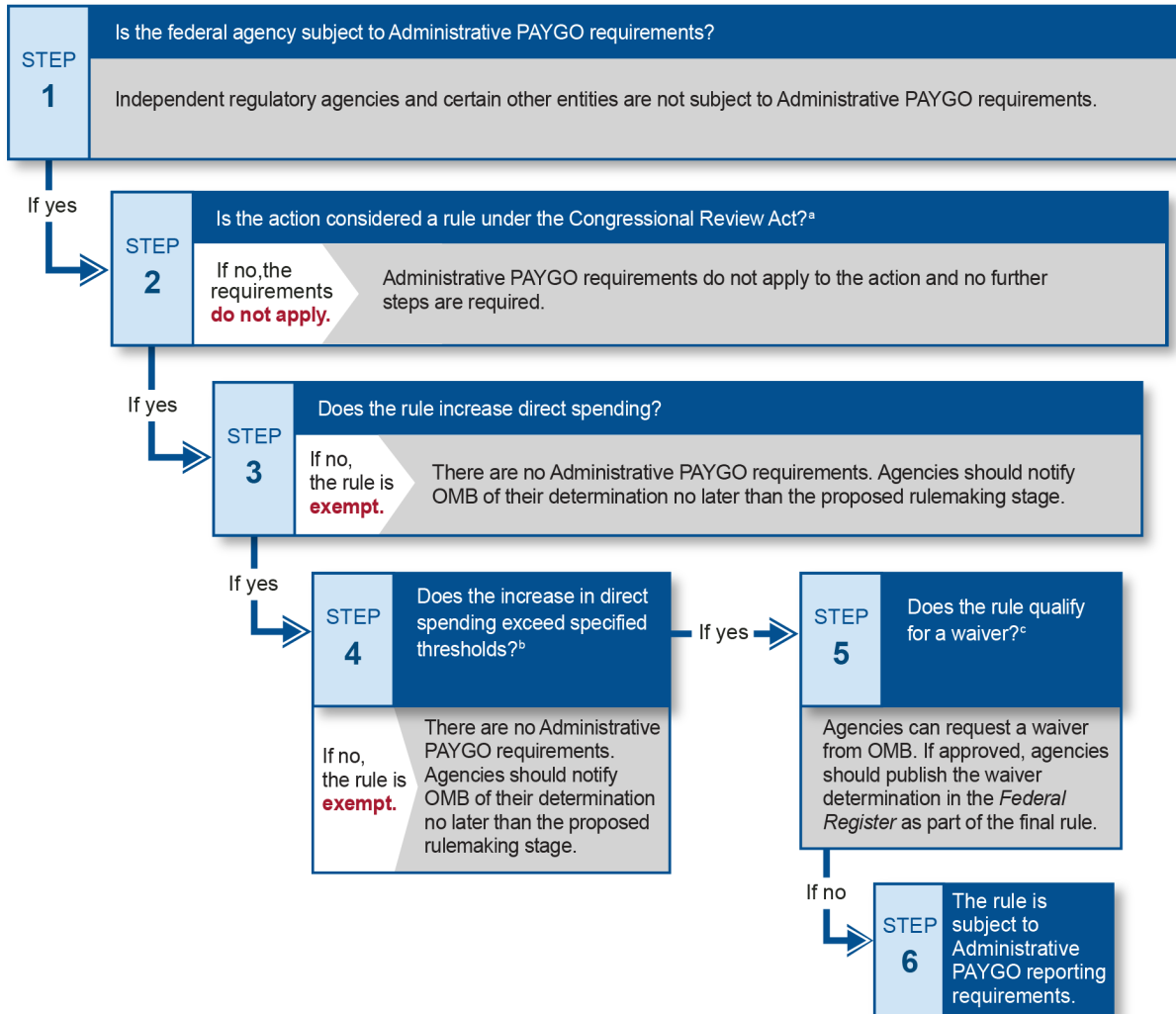
As of November 1, 2023, OMB has not received a written notice or written opinion and estimate for any significant rule finalized after June 3, 2023, according to OMB staff. Specifically:

- **Rules that were proposed before the September guidance.** We identified 28 economically significant or major rules that were finalized between June 3, 2023, and November 3, 2023.¹² The Director of OMB waived the requirements of Administrative PAYGO for two rules, which were finalized in July and November 2023.¹³ According to OMB staff, it does not appear that Administrative PAYGO requirements apply to the remaining 26 rules, based on their estimated direct spending effects, if any.
- **Rules that were proposed after the September guidance.** OMB staff also told us that from September 1, 2023, to November 1, 2023, no rules had been submitted at the proposed rulemaking stage that were determined by the submitting agency as likely to be subject to the Administrative PAYGO requirements.

How do agencies determine if an action is subject to Administrative PAYGO requirements?

To determine whether an action is subject to Administrative PAYGO requirements, agencies evaluate whether the action meets the applicable statutory definition of a “rule” and increases direct spending above certain thresholds, among other factors outlined in OMB’s guidance (see fig. 1).¹⁴

Figure 1: Agency Process for Determining Whether an Action is Subject to Administrative Pay-As-You-Go Requirements



OMB = Office of Management and Budget

PAYGO = Pay-As-You-Go

Source: GAO Analysis of OMB M-23-21. | GAO-24-106968

^aSee 5 U.S.C. § 804(3) (defining “rule”).

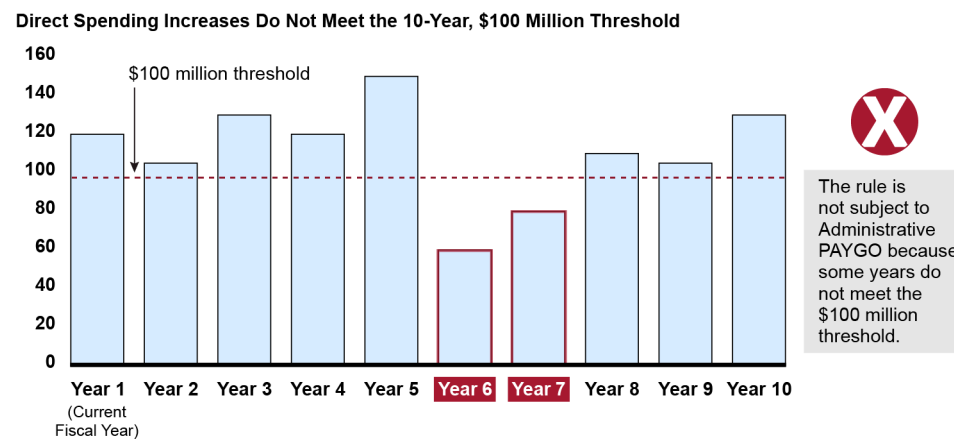
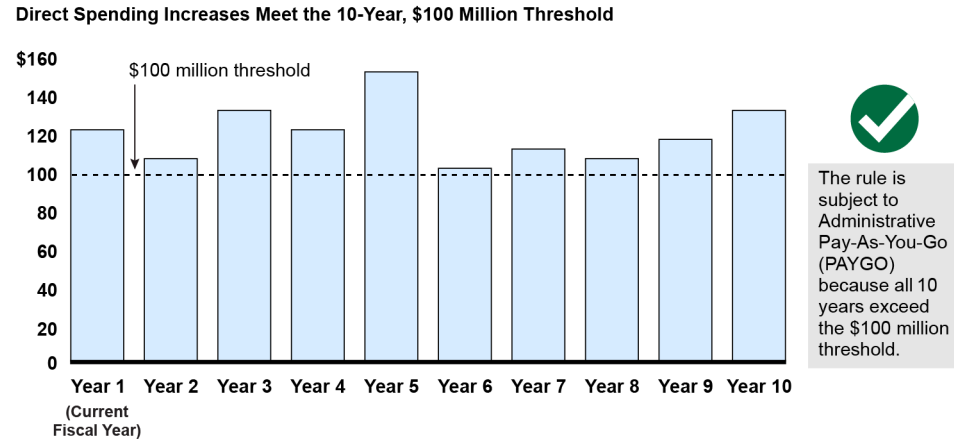
^bRules that increase direct spending relative to certain baselines (1) by less than \$1 billion over the 10-year period beginning with the current fiscal year, or (2) by less than \$100 million in any one year during that 10-year period are exempt. Pub. L. No. 118-5, § 266, 137 Stat. at 33. The baselines are the baseline estimate—as defined in section 257 of the Balanced Budget and Emergency Deficit Control Act of 1985, as amended—from the most recent of either the President’s Budget or Mid-Session Review, or the least costly implementation option for the rule reasonably identifiable by the agency, depending on whether the rule is required by law. Pub. L. No. 118-5, § 262(7), 137 Stat. at 31.

^cRules may qualify for a waiver if the rule is necessary for the delivery of essential services or effective program delivery. Pub. L. No. 118-5, § 265, 137 Stat. at 33.

By how much must a rule increase direct spending to be covered by Administrative PAYGO?

Administrative PAYGO applies to rules that increase direct spending relative to certain baselines by \$1 billion or more over the 10-year period beginning with the current fiscal year, and by \$100 million or more in each year during that 10-year period (see fig. 2).

Figure 2: Hypothetical Examples of Applicability of Administrative Pay-As-You-Go Requirements



Source: GAO. | GAO -24- 106968

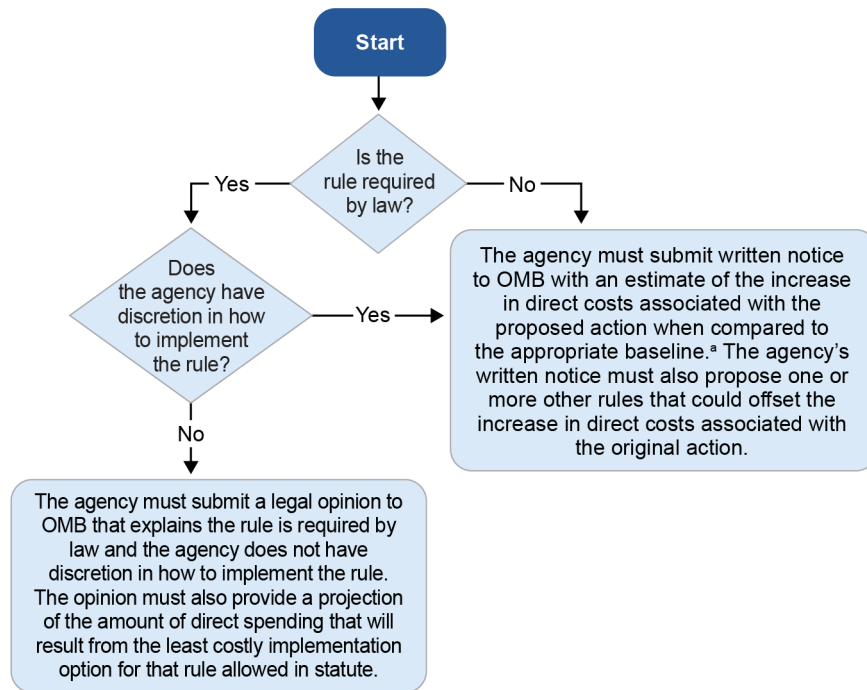
The baseline to which any increases in direct spending should be compared depends on whether the rule is discretionary (i.e., whether agencies choose to create the rule) or is required by law. For discretionary rules, the increase in direct spending should be compared to the baseline estimate—as defined in section 257 of the Balanced Budget and Emergency Deficit Control Act of 1985, as amended—from the most recent of either the President’s Budget or Mid-Session Review.¹⁵ For rules that are required by law, but for which an agency has discretion in how to implement the rule, the agency should compare the increase in direct spending to the least costly option reasonably identifiable by the agency for implementing the rule.

What are agencies required to do if a rule is subject to Administrative PAYGO requirements?

If an agency’s rule is subject to Administrative PAYGO requirements and those requirements have not been waived, OMB’s guidance directs the agency to notify OMB of the agency’s preliminary determination no later than the notice of proposed rulemaking stage of the rulemaking and the basis for that determination.

The information agencies are asked to submit to OMB is determined by whether the rule and implementation option are required by law (see fig. 3).

Figure 3: Process to Determine What Agencies Submit to the Office of Management and Budget for Rules Subject to Administrative Pay-As-You-Go Requirements



OMB = Office of Management and Budget
 Source: GAO Analysis of OMB Guidance. | GAO-24-106968

^aThe appropriate baseline is the baseline estimate—as defined in section 257 of the Balanced Budget and Emergency Deficit Control Act of 1985, as amended—from the most recent of either the President’s Budget or Mid-Session Review for rules that are not required by law. For rules required by law, but for which the agency has discretion on how to implement the rule, the appropriate baseline is the least costly implementation option reasonably identifiable by the agency.

OMB’s guidance states that the act does not legally require agencies to move forward with, or ultimately implement, proposed offsets.¹⁶

What are agencies required to report regarding their compliance with Administrative PAYGO?

OMB guidance directs agencies to include in their submissions of major rules to us under the Congressional Review Act a statement explaining whether:¹⁷

- the rule is exempt from Administrative PAYGO requirements (and the relevant exemption);
- the rule received a waiver from the OMB Director for the requirements of Administrative PAYGO; or
- the rule is covered, and that the agency submitted a notice or written legal opinion to the OMB Director.

If OMB grants a waiver to an agency, the agency should include a concise statement that the OMB Director waived the requirements of Administrative PAYGO in the preamble of its submission of that rule to the *Federal Register*. Agencies must publish a notice of the waiver in the *Federal Register* even for rules that will not be published in the *Federal Register*.

Agency Comments

We provided a draft of this report to OMB for review and comment. OMB provided technical comments, which we incorporated, as appropriate.

How GAO Did This Study

We reviewed the Fiscal Responsibility Act of 2023 and OMB's guidance related to Administrative PAYGO to determine how federal agencies are to comply with Administrative PAYGO requirements. We also spoke with and reviewed written responses from officials at OMB and its OIRA about their process for working with federal agencies, and the extent to which administrative actions that agencies submitted since enactment of the Fiscal Responsibility Act of 2023 had complied with Administrative PAYGO requirements.

We conducted this performance audit from July 2023 to November 2023 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

List of Addressees

The Honorable Sheldon Whitehouse
Chairman
The Honorable Chuck Grassley
Ranking Member
Committee on the Budget
United States Senate

The Honorable Gary C. Peters
Chairman
The Honorable Rand Paul, M.D.
Ranking Member
Committee on Homeland Security and Governmental Affairs
United States Senate

The Honorable Jodey Arrington
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The Honorable Brendan Boyle
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Endnotes

¹Pub. L. No. 118-5, §§ 261–270, 137 Stat. 10, 31–33 (2023). Direct spending is an appropriation or other budget authority made available to agencies in an act other than an appropriation act. 2 U.S.C. § 900(c)(8); see also *A Glossary of Terms Used in the Federal Budget Process*, [GAO-05-734SP](#) (Washington, D.C.: September 2005).

²Pub. L. No. 118-5, § 263, 137 Stat. at 32. For the purposes of this report, we refer to the requirements for both discretionary actions under section 263(a) and for nondiscretionary actions under section 263(b) as Administrative PAYGO requirements.

³The Statutory Pay-As-You-Go Act of 2010 generally requires that legislation proposing new direct spending or decreases in revenue not increase the deficit over 6- and 11-year periods. Under this act, the costs and savings of direct spending and revenue provisions enacted into law are recorded on PAYGO scorecards. The requirements are enforced at the end of each congressional session with a sequestration process resulting in across-the-board reductions in nonexempt direct spending to remedy any PAYGO violation. Pub. L. No. 111-139, tit. I, §§ 1–13, 124 Stat. 8–29 (2010).

The current requirements are similar to ones that were in effect between 1990 and 2002. See Budget Enforcement Act of 1990, Pub. L. No. 101-508, tit. XIII, §§ 13001–13214, 104 Stat. 1388, 1388-573 to 1388-623 (1990) (imposing requirements for fiscal years 1991 to 1995); Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 14003, 107 Stat. 312, 684–685 (1993) (extending the requirements through fiscal year 1998); Budget Enforcement Act of 1997, Pub. L. No. 105-33, tit. X, § 10205, 111 Stat. 251, 702–703 (1997) (extending the requirements through fiscal year 2002); Pub. L. No. 107-312, 116 Stat. 2456 (2002) (setting the balances on PAYGO scorecards for subsequent fiscal years at zero).

In addition to the statutory PAYGO requirements, the Senate and House of Representatives have had PAYGO requirements as part of each chamber's rules. The Senate first adopted its rule in 1993 with significant amendments in 2007. The House first adopted its rule in 2007. The Senate and House PAYGO rules have differed from statutory PAYGO in that (1) they apply while legislation is being considered; (2) they apply to bills individually, rather than cumulatively for fiscal years; and (3) they are enforced by points of order rather than sequestration. In addition, during the 112th, 113th, 114th, 115th, and 118th Congresses, the House had a Cut-As-You-Go (CUTGO) rule rather than a PAYGO rule—applying to bills that would increase direct spending but not bills that would decrease revenue. The current Senate PAYGO rule is section 4106 of the concurrent resolution on the budget for fiscal year 2018. H. Con. Res. 71, § 4106, 115th Cong., 131 Stat. 2319, 2350–2351 (2017). The current House CUTGO Rule is section 10 of Rule XXI. H.R. Res. 5, 118th Cong. (2023).

⁴GAO, *Federal Budget: Government-Wide Inventory of Accounts with Mandatory Spending, Fiscal Years 2001-2021*, [GAO-23-105674](#) (Washington, D.C.: July 12, 2023).

⁵Pub. L. No. 118-5, § 269, 137 Stat. at 33.

⁶OMB, *Guidance for Implementation of the Administrative Pay-As-You-Go Act of 2023*, OMB Memorandum M-23-21 (Washington, D.C.: Sept. 1, 2023).

⁷The Office of Information and Regulatory Affairs (OIRA) manages the review of a subset of draft proposed and final rules for compliance with laws and other requirements, adherence to analytic principles and rulemaking procedures, and consistency with administration priorities. OIRA reviews significant rules both before and after the public comment process. In some cases, OIRA requests changes before federal agencies publish a proposed or final rule. Significant regulatory actions are defined in Executive Order No. 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 51735, 51737 (Oct. 4, 1993) as amended by Exec. Order No. 14094, *Modernizing Regulatory Review*, 88 Fed. Reg. 21879, 21881 (Apr. 6, 2023).

⁸Federal rulemaking typically has three phases—initiating rulemaking actions, developing proposed rules, and developing final rules. As part of the rulemaking process, agencies are usually required to publish proposed rules in the *Federal Register* and solicit public comments before finalizing rules, a process that typically takes at least 30 days. 5 U.S.C. § 553.

⁹Pub. L. No. 118-5, § 263(a)(2)(B), 137 Stat. at 32.

¹⁰Pub. L. No. 118-5, § 263(a)(2)(B)(ii), 137 Stat. at 32.

¹¹OMB M-23-21. OMB’s guidance clarifies that in addition to complying with the guidance for proposed rules submitted after September 1, 2023 agencies are required to comply with any applicable requirements before finalizing rules submitted prior to September 1, 2023.

¹²We asked OMB about (1) major rules, which have an effect of \$100 million or more and (2) rules that are significant because they are likely to result in an economic effect of \$200 million or more. See 5 U.S.C. § 804(2); 88 Fed. Reg. at 21879. Rules in this second category have been commonly referred to as economically significant rules; OMB now refers to these rules as “significant under section 3(f)(1).” Not all rules proposed before the September guidance and potentially subject to Administrative PAYGO requirements were finalized between June 3, 2023, and November 1, 2023.

¹³88 Fed. Reg. 43820, 43867 (July 10, 2023) and 88 Fed. Reg. 77676, 77874 (Nov. 13, 2023).

¹⁴OMB M-23-21. The Fiscal Responsibility Act of 2023 defines an administrative action by adopting the definition of a rule from the Congressional Review Act (CRA). Pub. L. No. 118-5, § 262(1), 137 Stat. at 31, referencing 5 U.S.C. § 804(3). That definition in turn references the definition of a rule in the Administrative Procedure Act (APA) with certain exceptions. 5 U.S.C. § 551(4). The APA definition of a rule is “the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.” The CRA definition excludes rules of particular applicability (including rules that approve or prescribe for the future rates, wages, prices, services, or allowance therefor, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing); rules relating to agency management or personnel; and rules of agency organization, procedure or practice that do not substantially affect the rights or obligations of nonagency parties.

¹⁵Baseline estimates are defined in reference to section 257 of the Balanced Budget and Emergency Deficit Control Act of 1985, as amended. Pub. L. No. 118-5, § 262(7)(A), 137 Stat. at 31; 2 U.S.C. § 907. The Mid-Session Review of the Budget is a supplemental summary and update of the budget that the President submits to Congress in January or February of that year. [GAO-05-734SP](#).

¹⁶OMB M-23-21.

¹⁷OMB M-23-21.