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Red Tape Rising: Regulation in Obama's First Term

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Abstract
Annual regulatory burdens on Americans increased by nearly $70 billion during President Obama's first term in office, during which federal agencies imposed 131 new major regulations. In 2012 alone, the Administration issued a total of $23.5 billion in new annual regulatory costs from 25 major rulemakings. Only two rules last year decreased burdens. Much more regulation is on the way, with another 131 major rules on the Administration's agenda, including dozens more implementing Dodd–Frank and Obamacare. Action is needed by Congress, including requiring congressional approval of each new major regulation before it may take effect.

Congress and the White House have been focused for months on the federal budget—rightfully so, given perennial deficits and unsustainable levels of U.S. debt. However, federal spending accounts for only a portion of the burden placed on Americans by the government. Regulations impose huge additional costs, hindering job creation and innovation, while undermining Americans' fundamental freedoms.

Those costs are on the rise. Annual regulatory costs increased by more than $23.5 billion during President Barack Obama's fourth year in office—and by a total of nearly $70 billion during the first term. While historical records are incomplete, that magnitude of regulation is likely unmatched by any Administration in the nation's history. And, despite a much-touted initiative to weed out unnecessary

Key Points

- During President Obama's first four years in office, the annual regulatory burdens on Americans increased by nearly $70 billion. A total of 131 new major regulations were imposed.
- In 2012 alone, new annual regulatory costs reported by agencies totaled $23.5 billion. The most costly regulations were automotive fuel-economy standards issued by the EPA and DOT that will increase sticker prices by an estimated $1,800, followed by the EPA's power plant emission limits that will hike utility bills for consumers. Thirteen of the 25 new rules in 2012 targeted financial services.
- Significantly more regulation is on the way, with 131 additional rules in the pipeline. These include dozens more rules for implementing Dodd–Frank and Obamacare.
- Congress must stem this regulatory tide. Foremost among the proposed reforms is legislation to require congressional approval of major new regulations before they take effect, as provided by the REINS Act legislation.

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regulations, only two major rule changes reduced regulatory burdens in 2012.

There are many more rules to come, with an extraordinarily large number of regulations in the pipeline, including hundreds required under the 2010 Dodd–Frank Wall Street Reform and Consumer Protection Act and the 2010 Patient Protection and Affordable Care Act, widely known as Obamacare. As the red tape continues to mount, the Obama Administration has let regulatory oversight and transparency lapse. The White House office charged with overseeing regulatory policy has not had a director since August 2012,[1] and legal deadlines for key reports on rulemaking were ignored.

Reform of the regulatory process is critically needed, including steps to make Congress accountable for the rules that are imposed. To that end, congressional approval should be required for all new major regulations to take effect. Sunset deadlines should be set for all major regulations, and so-called independent agencies, such as the Securities and Exchange Commission, should be included in the executive branch regulatory review process.[2]

Measuring the Red Tape

Unlike federal taxation and spending, there is no official accounting of total regulatory costs. Estimates range from hundreds of billions of dollars to nearly $2 trillion each year. However, the number and cost of new regulations can be tracked, and both are growing substantially.

The most comprehensive source of data on new regulations is the Federal Rules Database maintained by the Government Accountability Office (GAO). According to the GAO data, federal regulators issued 2,605 new rules during Obama's fourth year in office.[3] Of these, 69 were classified as "major," generally defined as having an expected economic impact of at least $100 million per year.[4] Forty-two of these major rules were administrative or budgetary in nature, such as Medicare payment rates or hunting limits on migratory birds; twenty-five were "prescriptive" regulations that imposed burdens on private-sector activity. Only two major rules decreased regulation. During the President's first term,[5] there were 131 prescriptive rules. This compares to 52 such rules imposed during George W. Bush's first term.[6]

Based on agencies' own analyses, more than $23.5 billion in new annual costs were added last year, which brought Obama's first-term total to $69.8 billion. In addition, there were $4.6 billion in one-time implementation costs in 2012, raising the first-term total for one-time implementation costs to nearly $12 billion.

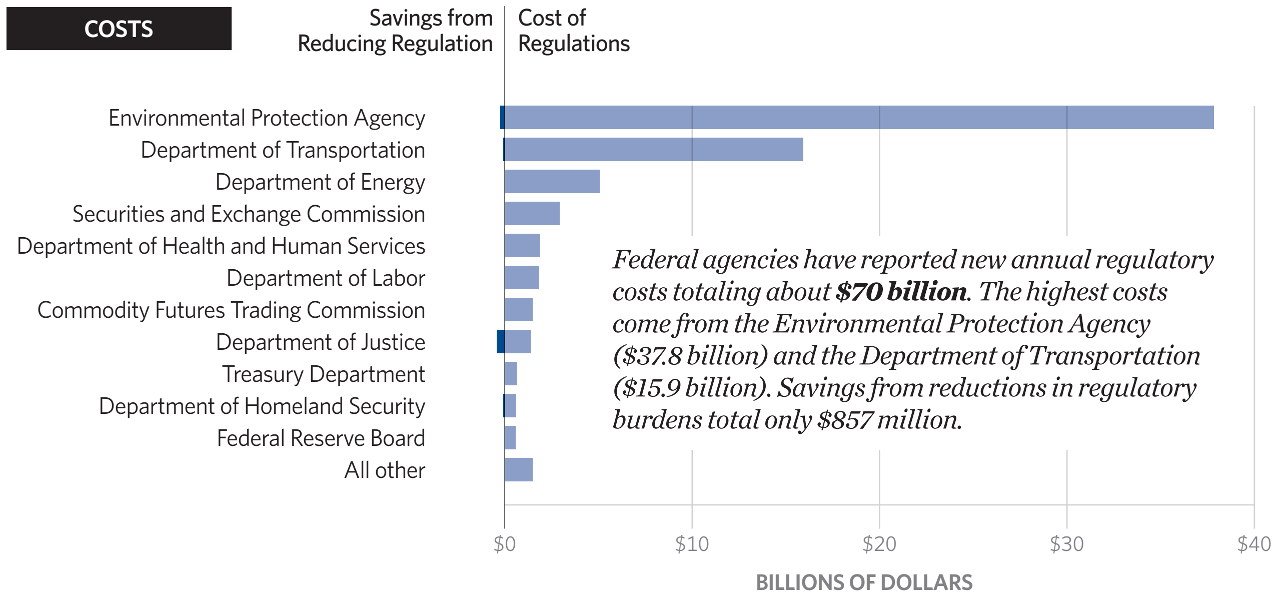
Only two major rules adopted in 2012 reduced regulatory burdens, providing just $81 million in

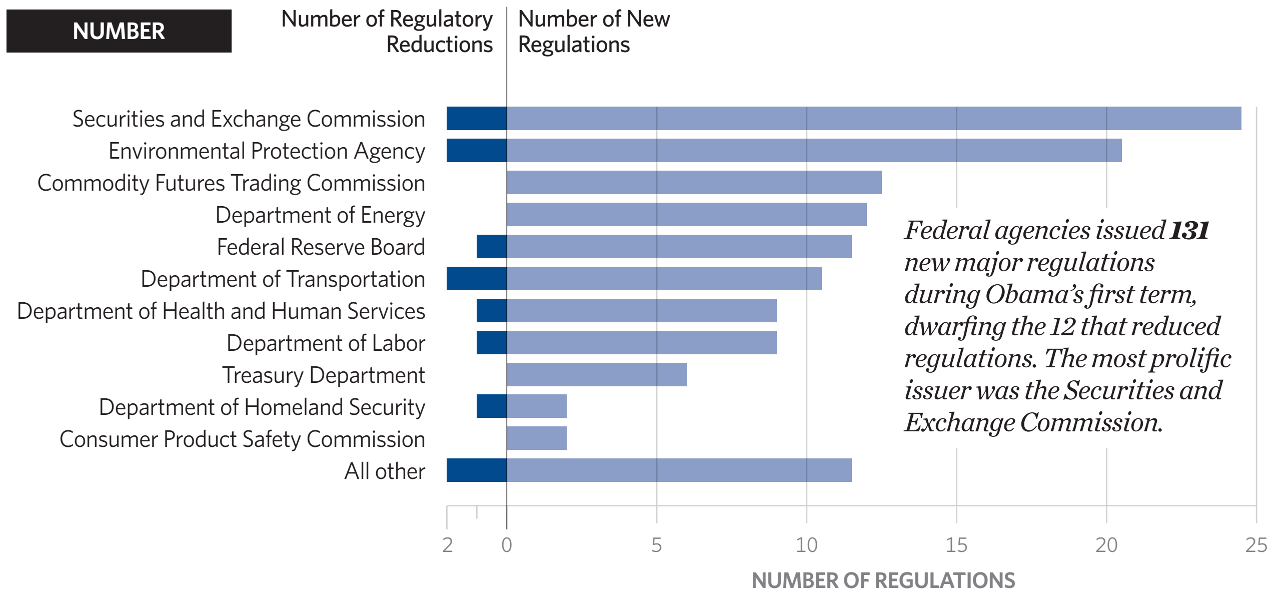
1. Howard Shelanski was nominated on April 26, 2013, to head the Office of Information and Regulatory Affairs.
2. This *Backgrounder* is the seventh in an ongoing series measuring trends in regulatory activity. The previous reports are: (1) James L. Gattuso, "Reining in the Regulators: How Does President Bush Measure Up?" Heritage Foundation *Backgrounder* No. 1801, September 28, 2004, http://www.heritage.org/Research/Regulation/bg1801.cfm; (2) Gattuso, "Red Tape Rising: Regulatory Trends in the Bush Years," Heritage Foundation *Backgrounder* No. 2116, March 25, 2008, http://www.heritage.org/research/regulation/bg2116.cfm; (3) Gattuso and Stephen A. Keen, "Red Tape Rising: Regulation in the Obama Era," Heritage Foundation *Backgrounder* No. 2394, April 8, 2010, http://www.heritage.org/Research/Reports/2010/03/Red-Tape-Rising-Regulation-in-the-Obama-Era; (4) Gattuso, Diane Katz, and Keen, "Red Tape Rising: Obama's Torrent of New Regulation," Heritage Foundation *Backgrounder* No. 2482, October 26, 2010, http://www.heritage.org/research/reports/2010/10/red-tape-rising-obamas-torrent-of-new-regulation; (5) Gattuso and Katz, "Red Tape Rising: A 2011 Mid-Year Report on Regulation," Heritage Foundation *Backgrounder* No. 2586, July 25, 2011, http://www.heritage.org/research/reports/2011/07/red-tape-rising-a-2011-mid-year-report; and (6) Gattuso and Katz, "Red Tape Rising: Obama-Era Regulation at the Three-Year Mark," Heritage Foundation *Backgrounder* No. 2663, March 13, 2012, http://www.heritage.org/research/reports/2012/03/red-tape-rising-obama-era-regulation-at-the-three-year-mark.
3. U.S. Government Accountability Office, GAO Federal Rules Database Search, http://www.gao.gov/legal/congressact/fedrule.html (accessed March 6, 2012). See Appendix A of this *Backgrounder* for the methodology.
4. As defined in the Congressional Review Act of 1996, a "major" rule is "any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in: (A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. The term does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act."
5. January 21, 2009, to January 20, 2013.
6. In addition, there were 15 major rule changes during Bush's first four years that decreased regulatory burdens.

CHART 1

Obama's First Term: Costs and Number of New Major Regulations, by Agency

Figures are for January 21, 2009, to January 20, 2013.





Source: Heritage Foundation calculations based on data provided by individual agencies.

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savings. For the entire first term, there were only 12 such rules, worth $857 million in savings—about 1.2 percent of the new costs. Four major regulations, representing $982 million in costs, also were invalidated by the courts.[7] (Subtracting these amounts from a gross total of $71.6 billion in new costs leaves the total increase of $69.8 billion.) This compares to $15.7 billion during the first four years of the previous Administration.[8]

This flood of new regulation has swelled the federal budget and the government. According to research by the Weidenbaum Center at Washington University in St. Louis and George Washington University's Regulatory Studies Center, federal spending on regulatory agencies increased more than 10 percent in President Obama's first term, from $46.7 billion in FY 2009 to more than $51.5 billion in FY 2012 (in constant 2005 dollars).[9] Staff levels grew by 21,654 full-time equivalents (FTEs) in the same period, from 261,961 FTEs to 283,615 FTEs (8 percent).

Regulations of 2012

Financial regulation dominated rulemaking in 2012, a direct result of the Dodd–Frank financial regulation act. In total, financial services regulators were responsible for 13 of the 25 new major rules issued during President Obama's fourth year; led by the Commodity Futures Trading Commission (CFTC), with nine; followed by the Securities and Exchange Commission (SEC), with six (two rules were issued jointly by the two agencies).

The newly created Consumer Financial Protection Bureau (CFPB) chipped in its first major rule, imposing restrictions on money transferred electronically from U.S. residents to relatives and friends abroad. Although outside the scope of this report, the CFPB also issued four more major regulations in January and February 2013. Seven other proposed regulations by the CFPB are pending.

The most costly regulations[10] were issued by the Environmental Protection Agency (EPA). Topping the list were new automotive fuel-economy standards, issued jointly by the EPA and the Department of Transportation, which the EPA calculated will cost $10.8 billion annually. The bulk of this cost will fall on drivers, who will pay an estimated $1,800 more for a new vehicle.

Coming in a close second was the EPA's so-called Utility MACT regulation,[11] at more than $10 billion annually. This 210-page regulation requires utilities and other electricity generators that use fossil fuels to install the "maximum achievable control technology" (MACT) to limit emissions. So stringent are the standards that potentially dozens of coal-fired power plants will close, thereby undermining the reliability of the power grid and substantially raising the costs of electricity for consumers. The EPA is currently reconsidering the portion of this rule pertaining to new power plants, and has stayed its implementation of the rule for such facilities.

Obamacare is also imposing enormous costs on the private sector. For example, businesses with more than 50 employees must either provide health care or pay a fine to offset an insurance tax credit for workers who purchase their own coverage.[12] Some insurers will be effectively forced to subsidize others at an aggregate cost of $18 billion annually by 2016.[13]

7. The EPA's rule on Interstate Transport of Fine Particulate Matter and Ozone; the SEC's so-called Proxy Access rule; the CFTC's rule on Position Limits for Futures and Swaps; and the HHS cigarette labeling regulations.
8. From January 21, 2001, to January 20, 2005, there were $16.9 billion in new burdens imposed and $1.2 billion in deregulatory actions, for a net increase of $15.7 billion. No adjustment was made for rules that were later invalidated by the courts.
9. The 2012 figures are based on outlays appropriated by Congress as of January 2012 for the full fiscal year. See Susan Dudley and Melinda Warren, "Growth in Regulators' Budget Slowed by Fiscal Stalemate: An Analysis of the U.S. Budget for Fiscal Years 2012 and 2013," *Regulators' Budget* No. 34, George Washington University and Washington University in St. Louis, July 2012, http://wc.wustl.edu/files/wc/imce/2013regreport.pdf (accessed April 22, 2013).
10. Of the regulations for which costs have been calculated.
11. Diane Katz, "Pulling the Plug on Obama's Energy Scheme," The Heritage Foundation, The Foundry, June 15, 2012, http://blog.heritage.org/2012/06/15/pulling-the-plug-on-obamas-energy-scheme/.
12. Brian Blase, "Obamacare and the Employer Mandate: Cutting Jobs and Wages," Heritage Foundation *WebMemo* No. 3108, January 19, 2011, http://www.heritage.org/research/reports/2011/01/obamacare-and-the-employer-mandate-cutting-jobs-and-wages.
13. "Department of Health and Human Services: Patient Protection and Affordable Care Act; Standards Related to Reinsurance, Risk Corridors and Risk Adjustment," *Federal Register*, Vol. 77, No. 57, March 23, 2012, p. 17220, http://www.gpo.gov/fdsys/pkg/FR-2012-03-23/pdf/2012-6594.pdf (accessed April 25, 2013).

Although the law does not take full effect until 2014, there is already ample evidence of its grave economic consequences. According to the Federal Reserve Board: "Employers in several districts cited the unknown effects of the Affordable Care Act as reasons for planned layoffs and reluctance to hire more staff."[14] Because many of the new rules are structured as administrative requirements for states or the federal government, rather than prescriptive regulation, they are not fully reflected in our regulatory totals. But that does not mean that their impact is insignificant.

Excessive regulation, of course, cannot be blamed on this Administration alone, although the accelerated rate of regulatory expansion in President Obama's first term appears unequaled. Congress ultimately authorizes all rulemaking, either through specific requirements, or through broad authorizations, leaving agencies great discretion to impose requirements. Moreover, a majority of rules adopted in the fourth year were promulgated by so-called independent agencies not subject to direct White House control (although they are managed by presidential appointees).[15] Regardless of responsibility, however, the result is the same: more burdens for Americans and the U.S. economy.

Understated Costs

The actual cost of new regulations is no doubt considerably higher than the totals reported by the regulatory agencies and detailed here. As a first matter, this report documents only "major" regulations. No cost-benefit analysis is typically performed for non-major rules, although the costs could be substantial.

In addition, some costs, such as lost innovation or violations of personal liberty, are impossible to quantify. What cost, for instance, should be put on the decision by the Department of Health and Human Service (HHS) to require all insurance plans to cover contraceptive services, regardless of moral convictions?

In all, regulatory agencies failed to provide quantified costs for 10 of the 25 major regulations issued in President Obama's fourth year.

Far too often, the quality of cost analyses by regulatory agencies is substandard—particularly with respect to Dodd–Frank rulemaking. For example, some regulations issued by the Securities and Exchange Commission under the act have been invalidated by the courts because of faulty cost-benefit analyses.

The so-called proxy access rule, adopted by the SEC in August 2010, would have required publicly traded corporations and investment firms to disseminate information—at company expense—about board nominations made by shareholders. Critics argue that such a provision would make it difficult to retain executive talent, while inviting special-interest groups to harass the firm. The SEC claimed that the benefits of the rule would justify its costs.

The U.S. Court of Appeals for the District of Columbia Circuit found otherwise, castigating the SEC's cost analysis as "inconsistently and opportunistically framed" in a manner that constituted "statutory neglect," adding that "[b]y ducking serious evaluation of the costs that could be imposed upon companies from use of the rule by shareholders representing special interests, particularly union and government pension funds, we think the Commission acted arbitrarily."[16]

Legal briefs are currently being submitted in another SEC case involving the "conflict minerals" rule, which requires firms to guarantee that its sources for four specific minerals are not fueling conflict in central Africa. The three business groups that filed suit[17] allege that the commission failed to conduct a proper cost-benefit analysis and underestimated the costs of the regulation.

Again, these are not isolated cases. One of the CFTC's own commissioners, Scott O'Malia, excoriated the CFTC last year for its shoddy analyses. In stating his opposition to a major Dodd–Frank regulation on swaps, O'Malia wrote: "I have reached a

14. Board of Governors of the Federal Reserve, "Current Economic Conditions by Federal Reserve District," February 2013, http://www.federalreserve.gov/monetarypolicy/beigebook/files/Beigebook_20130306.pdf (accessed April 22, 2013).

15. An independent agency is defined as one whose director or members cannot be removed by the President absent good cause. Such agencies are not currently subject to OMB regulatory review.

16. *Business Roundtable v. SEC*, 647 F. 3d 1144 (D.C. Cir., 2011).

17. National Association of Manufacturers, Chamber of Commerce of the United States of America, and the Business Roundtable.

tipping point and can no longer tolerate the application of such weak standards to analyzing the costs and benefits of our rulemakings."[18]

Problems are not limited to financial regulators. A recent study by a business group of the EPA's costing for six[19] major regulations identified systemic problems in agency methods.[20] In each instance, the EPA amortized capital expenditures over a period of 30 years to 50 years. But that extended time period distorts the financial burden firms will experience to meet near-term compliance deadlines.

Likewise problematic is the EPA's habit for ignoring the impacts on the supply chain when regulations create a surge in demand for emissions-control technologies and equipment. According to Nam Pham and Daniel Ikenson, the surge "will inevitably increase input prices and the compliance costs well above the EPA's estimates, which are based on current prices in the pollution abatement industry."[21]

The EPA's penchant for regulation at any cost was laid bare in its analysis of the so-called Utility MACT rule: "We may determine it is necessary to regulate…even if we are uncertain whether [the rule] will address the identified hazards.… We also may find it necessary to regulate…even if we conclude…that the imposition of the other requirements of the [Clean Air Act] will significantly reduce the identified hazard."[22]

Skewed Benefits

The Obama Administration has defended the high costs of its regulations by pointing to the projected benefits of the rules. But the total burden of regulation is a concern independent of benefits. Regulatory costs are like federal spending: Even if the benefits of a particular program exceed its costs, it is still important to track how much is being spent.

Moreover, benefit estimates—as calculated by the agencies—need to be considered with skepticism. Neither costs nor benefits can be perfectly quantified. But while regulators have an incentive to minimize the costs of regulations, they have an incentive to inflate their benefits.

The two most expensive regulations of 2012—the EPA's so-called Utility MACT rule for power plants and the EPA's and Department of Transportation's (DOT) automotive fuel-efficiency standards—both have dubious benefit estimates. The new emission standards for power plants, which the EPA estimated will cost $10.8 billion annually, have been trumpeted by agency officials as a way to reduce dangerous mercury levels in the air.[23] Benefits were estimated at an eye-popping $33 billion to $90 billion. Not mentioned in the EPA's press releases is the fact that virtually all of the asserted benefits—99.993 percent—stem from reductions in airborne "particulate matter" (PM),[24] a pollutant that is already subject to EPA regulations, which the EPA has said are sufficient to protect public health. Moreover, the benefits of additional reductions in particulate matter are speculative, lacking any connection to real-world exposures.[25]

The most costly new rule of 2012, the Corporate Average Fuel Economy (CAFE) standards jointly

18. "Commodity Futures Trading Commission: Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants," *Federal Register*, Vol. 77, No. 64, April 3, 2012, p. 20128, http://www.gpo.gov/fdsys/pkg/FR-2012-04-03/pdf/2012-5317.pdf (accessed April 22, 2013).

19. The six regulations are the Utility MACT; Boiler MACT; the CCR (proposed); the Cross-State Air Pollution rule; regulation of Cooling Water Intake Structures (proposed); and Ozone NAAQS (proposed).

20. Nam D. Pham and Daniel J. Ikenson, "A Critical Review of the Benefits and Costs of EPA Regulations on the U.S. Economy," NDP Consulting, November 2012, http://www.nam.org/~/media/423A1826BF0747258F22BB9C68E31F8F.ashx (accessed April 22, 2013).

21. Ibid.

22. "Environmental Protection Agency: National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units," *Federal Register*, Vol. 76, No. 85, May 3, 2011, p. 24976, http://www.gpo.gov/fdsys/pkg/FR-2011-05-03/pdf/2011-7237.pdf (accessed April 22, 2013).

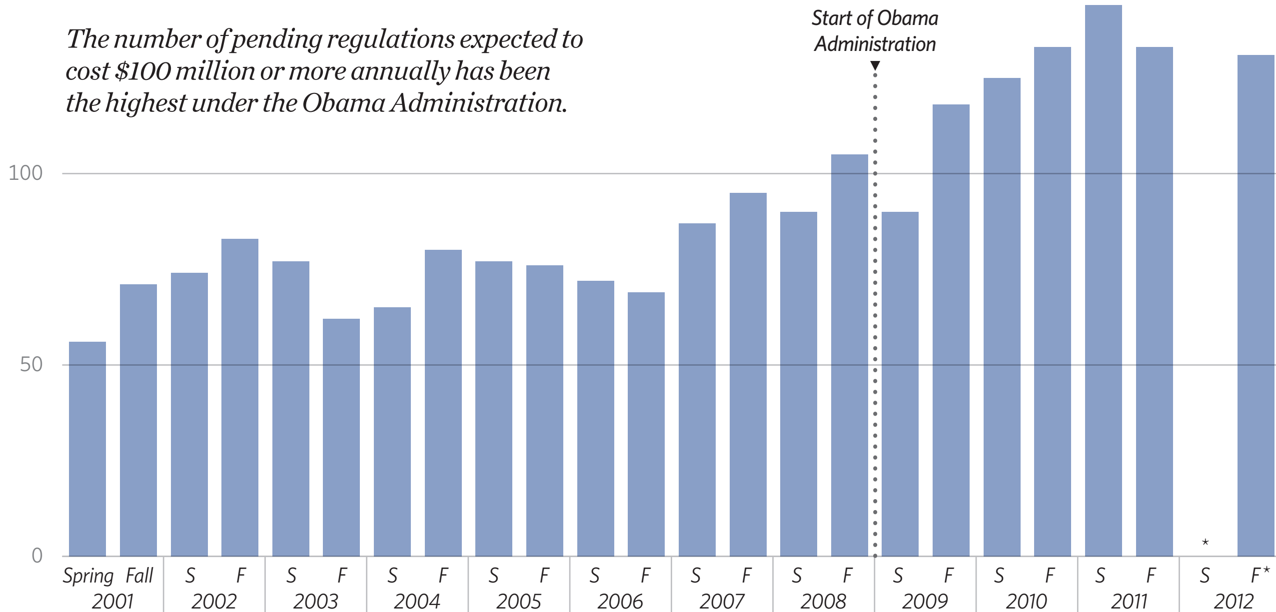
23. Environmental Protection Agency, "Mercury and Air Toxics Standards (MATS): Basic Information," April 10, 2012, http://www.epa.gov/mats/basic.html (accessed April 22, 2013).

24. Susan E. Dudley, "Perpetuating Puffery: An Analysis of the Composition of OMB's Reported Benefits of Regulation," *Business Economics*, Vol. 47, No. 3 (July 2012).

25. Marlo Lewis, "Big Costs, Illusory Benefits: Why Congress Should Nix the Utility MACT," *Forbes*, June 12, 2012, http://www.forbes.com/sites/realspin/2012/06/12/big-costs-illusory-benefits-why-congress-should-nix-the-utility-mact/2/. (accessed April 22, 2013).

CHART 2

More Costly Regulations in the Pipeline



* No Unified Agenda was released for Spring 2012.

Source: Data obtained from Office of Information and Regulatory Affairs, Office of Management and Budget, "Unified Agenda and Regulatory Plan Search Criteria," http://www.reginfo.gov/public/do/eAgendaAdvancedSearch (accessed April 10, 2013). (Note: Under "Agency or Agencies," select "All," then "Continue." Under the "Priority" subheading, select "Economically Significant." Under "Agenda Stage of Rulemaking," select "Proposed Rule Stage" and "Final Rule Stage.")

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adopted by the EPA and the DOT's National Highway Traffic Safety Administration (NHTSA), illustrates the growing use of "private benefits," which represent government mandates usurping consumer decision making, even in the absence of a market failure. In its own analysis, the EPA determined the largest impact of the new rules to be consumers saving money due to buying less gasoline, not improved air quality or reductions in global warming. The EPA claims these private savings outweigh the higher sticker prices consumers will inevitably pay. But consumers do not seem to agree, as shown by their marketplace decisions. After all, if fuel efficiency was such a good deal for consumers, why are regulations needed to force them to buy more fuel-efficient vehicles? Either consumers are wrong or the regulators are wrong. The EPA and NHTSA—at the behest of Congress—have concluded that consumers do not know what is in their own interest. Thus, in this case, as in many others, the rejection of consumer preference is counted as a benefit.

In the Pipeline

Hundreds of costly new regulations are also in the works, many of which derive from the Dodd–Frank statute, Obamacare, and the EPA's global warming crusade.

The most recent Unified Agenda—a semi-annual compendium of planned regulatory actions by agencies—lists 2,305 rules (proposed and final) in the pipeline. Of these, 131 are classified as "economically significant." This is two less than the number pending in the previous agenda (fall 2011), and still high by historical standards. This year's 131 "economically significant" rules represent an increase of 133 percent from the 56 identified in 2001.

An unusually large number of rules are pending at the Office of Information and Regulatory Affairs

(OIRA), the Administration's regulatory review office. According to the latest OIRA data, 81 of the 150 regulations awaiting review in mid-March have been pending for more than 90 days, exceeding the maximum time allotted under Executive Order 12866.[26] Another seven were pending for more than 60 days (but fewer than 90 days).

Action on some of the Administration's most ambitious regulations was postponed last year, including more stringent requirements for controlling ozone emissions. As proposed by the EPA, the rule would cost $90 billion or more annually and, potentially, millions of jobs. However, the President reportedly instructed then-EPA Administrator Lisa Jackson to hold off on the new standards until 2013.[27]

Also on hold were various regulations to control power plant emissions of so-called greenhouse gases that would dramatically increase energy costs, as well as the designation of coal ash as a "hazardous substance"—estimated to cost $79 billion to $110 billion and thousands of jobs.

If the delays in rulemaking were the result of more thorough analyses or consideration of regulatory alternatives, that would be good news for the economy and consumers. But there is no indication that the Administration has embraced a newfound skepticism toward red tape. In fact, the regulations are expected to emerge again this year, evidently regarded by the Administration as more advantageous timing.

Lack of Transparency

The aggressive rulemaking of President Obama's first term also overlapped with marked erosion in regulatory transparency and accountability.

The problem is exemplified by the Administration's failure to issue regulatory plans as required by law. In 1980, Congress mandated a regulatory agenda from each agency under the Regulatory Flexibility Act. The statute calls for release every April and October of a description of all rules likely to have a "significant economic impact" on a substantial number of small entities. A series of subsequent executive orders extended agenda requirements to all regulations under development or review by some 60 departments, agencies, and commissions.

President Obama ignored both the April 2012 and October 2012 deadlines, and only released an agenda on December 21, 2012, the Friday before Christmas. But notice of upcoming regulatory actions is an essential tool of government transparency. The agenda enables citizens to participate in the rulemaking process, businesses to plan, and Congress to engage in oversight. The stakes are especially high now because of the hundreds of rules related to Obamacare and the Dodd–Frank financial regulation statute.

The President's neglect of the law contrasts sharply with his promise of an "unprecedented level of openness in government transparency."[28]

Likewise troubling is the Administration's penchant for issuing major rules without providing opportunities for public comment. The problem did not originate with the Obama Administration, of course. According to a recent report by the GAO, 35 percent of major rules and about 44 percent of other rules were issued without soliciting public comment between 2003 and 2010. However, the largest numbers of major rules were issued without comment in 2009 and 2010 (34 in each year), the first two years of the Obama Administration.[29]

Steps for Congress

Congress should increase scrutiny of new and existing regulations to ensure that each is necessary, and that costs are minimized, by:

1. **Requiring congressional approval of new major regulations promulgated by agencies.** Under the Constitution, Congress is responsible for the rules governing Americans. Regulatory agencies operate only with the authority delegated, and within the limits set by Congress.

26. EO 12866 is the 1993 presidential Executive Order, which requires all major regulations to be reviewed by OIRA before being promulgated.
27. Deborah Solomon and Tennille Tracy, "Obama Asks EPA to Pull Ozone Rule," *The Wall Street Journal*, September 3, 2011, http://online.wsj.com/article/SB10001424053111904716604576546422160891728.html (accessed April 23, 2013).
28. The White House, "Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies," http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment (accessed October 31, 2012).
29. Government Accountability Office, "Federal Rulemaking: Agencies Could Take Additional Steps to Respond to Public Comments," GAO-13-21, December 2012, http://www.gao.gov/assets/660/651052.pdf (accessed April 23, 2013).

Typically, agencies are given broad mandates, allowing them discretion as to what to regulate and how to do so. This may sometimes be necessary, but Congress should not be able to evade accountability for the outcome. Requiring Congress to affirmatively approve major new rules, as provided in the proposed Regulations from the Executive in Need of Scrutiny (REINS) Act (H.R. 367, S. 15) would help to ensure a congressional check on regulators, as well as the accountability of Congress itself.[30]

2. **Developing a congressional regulatory analysis capability.** In order to responsibly exercise its duties, Congress needs the capability to analyze proposed and existing rules independently, without reliance on the Office of Management and Budget or the regulatory agencies. This could be done through an existing congressional institution, such as the Congressional Budget Office (CBO) or the GAO, or through a new office created by Congress. Such a capability would also help Congress to better evaluate the regulatory consequences of its legislation. This would not require any net increase in staff or budget, but instead could be paid for through reductions in existing regulatory agency expenses, or reprioritizing existing resources in the CBO or GAO.

3. **Establishing a sunset date for federal regulations.** While every new regulation promulgated by executive branch agencies undergoes a detailed review, there is no similar process for reviewing the need for regulations already on the books. Old regulations tend to be left in place, even when they are no longer useful. This tendency can be particularly harmful when, as now, there is a flood of new and untested regulations. To ensure that substantive review occurs, regulations should automatically expire if they are not explicitly reaffirmed by the relevant agency through a notice and comment rulemaking. As with any such regulatory decision, this reaffirmation would be subject to review by the courts. Sunset clauses already exist for some new regulations. Regulators, and if necessary, Congress, should make them the rule, not the exception.

4. **Subjecting "independent" agencies to executive branch regulatory review.** Increasingly, rulemaking is being done by so-called independent agencies outside of direct executive branch control. Agencies such as the Federal Communications Commission, the SEC, and the CFPB are not subject to review by OIRA or even required to conduct cost-benefit analyses. This is a serious gap in the regulatory process. These agencies should be fully subject to the safeguards applied to executive branch agencies.

Conclusion

Despite the weak economy, the Obama Administration continued to increase the regulatory burden on Americans in 2012, adding 25 major regulations that increase regulatory burdens by more than $23.5 billion annually. From the beginning of the Obama Administration through 2012, a staggering 131 major regulations that increase regulatory burdens have been issued, with costs approaching $70 billion a year. While the President has acknowledged the need to rein in regulation, little has been done to address the problem. Instead, it is getting worse.

Congress—which shares much of the blame for excessive regulation—must act to ensure that unnecessary and excessively costly regulations are not imposed on the U.S. economy and consumers. Without decisive action, the costs of red tape will continue to grow, and the economy—and average Americans—will be the victims.

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30. James L. Gattuso, "Taking the REINS on Regulation," Heritage Foundation *WebMemo* No. 3394, October 12, 2011, http://www.heritage.org/research/reports/2011/10/taking-the-reins-on-regulation.

Appendix A: Methodology

Rules included are those categorized as "major" as reported in the Government Accountability Office's Federal Rules Database (http://www.gao.gov/legal/congressact/fedrule.html). Unlike the similar database maintained by the Office of Management and Budget (OMB), the GAO's Federal Rules Database includes rules by independent agencies such as the Securities and Exchange Commission, which do not undergo executive branch review. All such rules appearing in the database as of April 25, 2013, are included. Rules adopted before that date, but not yet posted in the GAO database, are not included (with the exception of the SEC "conflict minerals" rule, which was adopted in September 2012, but not posted in the GAO database).

Only "prescriptive" rules were included. Rules that do not limit activity or mandate activity by the private sector were excluded from the totals provided. Thus, for instance, budgetary rules that set reimbursement rates for Medicaid or conditions for receipt of agricultural subsidies are excluded.

Cost figures are based on agency assessments of rule costs as stated when the rule was adopted, typically from Regulatory Impact Analyses conducted by agencies issuing each rule. In calculating the cost of rules from the second Bush Administration, OMB estimates were used if available. If an agency did not prepare an analysis, or did not quantify costs, no amount was included, although the rule was included in the count of major regulations.

The agencies' totals were adjusted to constant 2010 dollars using the gross domestic product deflator at Areppim's "Current to Real Dollars Converter" (http://stats.areppim.com/calc/calc_usdlrxdeflator.php).

Where applicable, a 7 percent discount rate was used. Where a range of values was given by an agency, costs were based on the most likely scenario if so indicated by the agency; otherwise the mid-point value was used. The date of a rule was based, for classification purposes, on the date of publication in the *Federal Register*.

Appendix B: Major Rules Increasing Regulatory Burdens (1/21/2012–1/20/2013, Cost totals in constant 2010 dollars)

February 3, 2012: *Department of Labor, Employee Benefits Security Administration, "Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure"*

The rule requires investment advisers, trustees, record keepers, and other service providers to pension plans to disclose information about their compensation and any potential conflicts of interest. Officials acknowledge that many fiduciaries already require such disclosures. Critics warn that the payment threshold at which the regulation applies—$1,000—is unnecessarily low and will subject relatively insignificant service arrangements to costly disclosure requirements. Others contend that the department has underestimated the costs of compliance. Pension plans and their participants ultimately will pay higher fees because of the additional reporting burdens on service providers. The added expense and complexity of the rules may also dissuade small businesses from establishing pension programs for employees.

Annual Cost: $62.4 million

February 7, 2012: *Commodity Futures Trading Commission, "Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions"*

This Dodd–Frank rule prescribes the manner in which cleared swaps (and related collateral) must be treated prior to and following bankruptcy. It is part of the sweeping new regulation of derivatives that resulted from lawmakers misinterpreting the primary causes of the 2008 financial crisis.

Annual Cost: No figures provided by commission

February 7, 2012: *Bureau of Consumer Financial Protection, "Electronic Fund Transfers (Regulation E)"*

This rule imposes new obligations and restrictions on businesses that process online remittances, the tens of billions of dollars transferred electronically each year from U.S. residents to relatives and friends abroad. Although most states require money transmitters to obtain a license, the Dodd–Frank act granted broad authority over remittances to the new Consumer Financial Protection Bureau. The CFPB issued extensive service requirements in February 2012 despite repeated warnings they would prove unworkable. On December 21, 2012, the CFPB announced its intention to "refine" three elements of the rules. The unnecessary regulations will cause some service providers to halt international wire transfers. The higher costs imposed by the regulation, along with less competition, will mean fewer, more costly consumer options.

Annual Cost: No figures provided by agency

February 16, 2012: *Environmental Protection Agency, "National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units"*

Commonly referred to as Utility MACT, this regulation forces utilities to install "maximum achievable control technology" to reduce emissions of mercury and other pollutants. The EPA claims the rule would produce $33 billion to $90 billion in annual benefits, but researchers have documented that 99.993 percent of that benefit value is actually derived from reducing particulates, although a previous rulemaking already limits particulates to levels the EPA deemed to be safe.[31] Critics also point out that even the $6 million attributed to the reduction of mercury emissions is likely an exaggeration because the EPA has ignored clinical studies that demonstrate the human body's ability to protect itself against mercury. The portion of the rule related to new power plants has been stayed by the EPA, which is reconsidering those requirements. The regulation will spike residential, commercial, and

31. Susan E. Dudley, "Perpetuating Puffery: An Analysis of the Composition of OMB's Reported Benefits of Regulation." See also prepared Statement of Susan Dudley, "Hearing on the Review of Mercury Pollution's Impacts to Public Health and the Environment," before the Subcommittee on Clean Air and Nuclear Safety, Committee on Environment and Public Works, U.S. Senate, April 17, 2012, http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=b269df79-8ef3-4897-8483-c5f33fb3ec62 (accessed April 23, 2013).

industrial electricity rates which, in turn, will put a drag on the economy. Closures of a significant number of coal-fired power plants (for which compliance is too costly) will undermine reliability of the electrical grid and increase the risk of brownouts and blackouts.

Annual Cost: $10 billion

February 17, 2012: *Commodity Futures Trading Commission, "Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties"*

This Dodd–Frank rule prescribes external business conduct standards for swap dealers and major swap participants. These constitute broad new disclosure requirements and potential liabilities for the swap market. Officials acknowledge that some of the requirements were not mandated by Dodd–Frank. This extensive new regulation establishes anti-fraud, disclosure, and other standards for participants in swap markets. The new standards substantially change the way swaps are negotiated and executed, potentially burdening or raising uncertainty in the market. While most family investors will not be directly affected, any reduction in the efficiency of these markets could ultimately stunt economic growth and opportunity.

Annual Cost: No figures provided by commission

February 21, 2012: *Department of Labor, Employment and Training Administration, "Temporary Non-Agricultural Employment of H–2B Aliens in the United States"*

This rule specifies the process by which employers obtain a temporary labor certification from the Department of Labor (DOL) for use in petitioning the Department of Homeland Security to employ a nonimmigrant worker in H-2B status. It also imposes new standards for worker protections. On April 26, 2012, the U.S. District Court for Northern Florida enjoined the DOL from enforcing the rule. Plaintiffs claimed that the DOL failed to comply with the Regulatory Flexibility Act and the regulation is "arbitrary and capricious." Officials have acknowledged that the DOL does not have express authority from Congress, but that it can be "inferred" from other acts of Congress. The wage and work rule standards will increase labor costs—which ultimately will be borne by consumers. Higher labor costs also translate into fewer job opportunities for the unemployed.

Annual Cost: $71 million

February 22, 2012: *Securities and Exchange Commission, "Investment Adviser Performance Compensation"*

Registered investment advisers are barred from collecting performance-based compensation unless the client is "qualified" under the Investment Advisers Act of 1940. This rule amends the act by revising the dollar amount threshold used to determine whether a client is "qualified." The act also is amended to allow for a change in the eligibility threshold every five years, based on inflation, and to exclude the value of a person's primary residence and certain associated debt from the threshold test. This regulation will reduce average Americans' choice among investment managers, precluding alternatives available to wealthier investors. It will also create a barrier for new investment managers to enter the market.

Annual Cost: No figures provided by commission

March 23, 2012: *Department of Homeland Security, Coast Guard, "Standards for Living Organisms in Ships' Ballast Water Discharged in U.S. Waters"*

This regulation is intended to limit the introduction of non-native species into U.S. waters by establishing new standards for the allowable concentration of living organisms in ships' ballast water that is discharged to U.S. waters. The Coast Guard also has established a new approval process for ballast water management systems. A second-phase standard will be issued by the Coast Guard sometime in the future, while, the EPA is developing a broader set of standards. These concurrent rulemakings constitute a type of regulatory limbo for freight handlers and their employees.

Annual Cost: $358.4 million

March 26, 2012: *Department of Labor, Occupational Safety and Health Administration, "Hazard Communication"*

This regulation modifies the classification criteria for chemical hazards, and modifies labeling standards to conform to the United Nations' Globally Harmonized System of Classification and Labeling of Chemicals. The Occupational Safety and Health

Administration (OSHA) is likewise modifying standards for flammable and combustible liquids, process safety management, and most substance-specific health standards. Some five million manufacturing or processing facilities will be affected.

Annual Cost: $201 million

April 3, 2012: *Commodity Futures Trading Commission, "Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures and Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants"*

These Dodd–Frank regulations establish reporting and recordkeeping requirements for swap dealers and major swap participants, risk management procedures, monitoring of trading, supervision; business continuity and disaster recovery, disclosure and the ability of regulators to obtain general information, and antitrust considerations, among others. These all are part of sweeping new regulation of derivatives that resulted from lawmakers misinterpreting the primary causes of the 2008 financial crisis. Critics argue that the rules are unduly burdensome,[32] hindering the ability of swaps markets to allocate risk, hurting consumers and investors.

Annual Cost: $171.7 million
Implementation Cost: $2.4 billion

April 9, 2012: *Commodity Futures Trading Commission, "Customer Clearing Documentation, Timing of Acceptance for Clearing, and Clearing Member Risk Management"*

As called for by Dodd–Frank, these regulations establish standards for swap transactions, including documentation between a customer and a futures commission merchant; the timing of acceptance or rejection of trades for clearing; and risk management procedures of futures commission merchants, swap dealers, and major swap participants.

Annual Cost: No calculation by commission
Implementation Cost: $15 million

May 23, 2012: *Commodity Futures Trading Commission and Securities and Exchange Commission, "Further Definition of 'Swap Dealer,' 'Security-Based Swap Dealer,' 'Major Swap Participant,' 'Major Security-Based Swap Participant' and 'Eligible Contract Participant'"*

This regulation defines various terms related to the derivatives market for the regulation of swaps by the CFTC and the regulation of security-based swaps by the SEC as required under Dodd–Frank. The complexity of the definitions reflects the challenge investors will face as the government attempts to regulate a highly customized and dynamic market.

Annual Cost: $8.56 million
Implementation Cost: $40.8 million

May 31, 2012: *Department of Energy, "Energy Conservation Program: Energy Conservation Standards for Residential Clothes Washers"*

This regulation imposes stricter energy conservation standards for residential washing machines. The new standards will mean much higher appliance costs for consumers as well as reduced performance.

Annual Cost: $185 million

June 19, 2012: *Commodity Futures Trading Commission, "Core Principles and Other Requirements for Designated Contract Markets"*

This massive Dodd–Frank regulation expands the criteria that must be met for designation as a "contract market," which function as boards of trade for futures options, by the CFTC. Critics contend that the trading volume criteria set by the rule are arbitrary and will unduly constrain futures trading. By effectively creating financial utilities, this regulation puts taxpayers at risk of shouldering yet more bailouts.

Annual Cost: No figures provided by commission

August 1, 2012: *Securities and Exchange Commission, "Consolidated Audit Trail"*

The regulation requires national securities exchanges and national securities associations to

32. Statement of Commissioner Scott O'Malia, CFTC Final Rule, "Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants," *Federal Register*, Vol. 77, No. 64, April 3, 2012, https://www.federalregister.gov/articles/2012/04/03/2012-5317/swap-dealer-and-major-swap-participant-recordkeeping-reporting-and-duties-rules-futures-commission (accessed April 23, 2013).

submit a national market system plan for a tracking system for securities, from the time of order through routing, cancellation, modification, or execution. The rule imposes huge record-keeping costs, previously estimated at $4 billion in upfront costs, and $2 billion in annual operating costs. The centralization of securities data means investors are at much greater risk that their privacy will be breached or confidential information about their investments will be misused.

Annual Cost: No annual figure provided by commission

Implementation Cost: $12.2 million

August 13, 2012: *Commodity Futures Trading Commission and Securities and Exchange Commission, "Further Definition of 'Swap,' 'Security-Based Swap,' and 'Security-Based Swap Agreement'; 'Mixed Swaps'; 'Security-Based Swap Agreement Recordkeeping'"*

This regulation defines various terms related to the derivatives market for the regulation of swaps by the CFTC and the regulation of security-based swaps by the SEC as required under Dodd–Frank. The complexity of the definitions reflects the challenge investors will face as the government attempts to regulate a highly customized and dynamic market.

Annual Cost: No figures provided by commissions

August 16, 2012: *Environmental Protection Agency, "Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews"*

In this action, the EPA revised emissions standards for natural gas processing plants, gas wells, centrifugal compressors, reciprocating compressors, pneumatic controllers, and storage vessels. This action also expands and modifies testing and monitoring, recordkeeping, and reporting requirements. Critics contend the regulations underestimate the costs of compliance, and will unnecessarily reduce production of much-needed energy fuels. Excessive regulation of oil and natural gas processing will increase fuel costs for both families and businesses.

Annual Cost: $177.4 million

Implementation Cost: $25 million

August 30, 2012: *Department of the Treasury, Office of the Comptroller of the Currency, Federal Reserve System, and Federal Deposit Insurance Corporation, "Risk-Based Capital Guidelines: Market Risk"*

This final rule revises market risk capital rules to enhance the sensitivity to risks that are not adequately captured under current methodologies, and to increase transparency through enhanced disclosures.

Annual Cost: $172.7 million

September 12, 2012: *Environmental Protection Agency, "Standards of Performance for Petroleum Refineries; Standards of Performance for Petroleum Refineries for Which Construction, Reconstruction, or Modification Commenced After May 14, 2007"*

This rule finalizes amendments and technical corrections for standards of performance for process heaters and flares.

Annual Cost: $103.2 million

September 12, 2012: *Securities and Exchange Commission, "Conflict Minerals"*

This Dodd–Frank rule requires manufacturers for whom conflict minerals—minerals mined in war zones such as the Democratic Republic of the Congo, which helps to fuel extended conflict—are necessary to the functionality or production of a product to disclose annually whether any of the minerals originated in the Democratic Republic of the Congo or an adjoining country. If the minerals do originate there, manufacturers are required to submit a report to the commission and arrange an independent audit of the measures taken to exercise due diligence on the source and chain of custody of the minerals. Beyond the exorbitant costs of implementing the rule, some critics contend that the regulation is devastating the Congolese mining industry and thus hurting the economy and the population rather than ending corruption and violence. This expansive regulation will increase the manufacturing costs of an array of products—costs which ultimately will be borne by consumers. Higher manufacturing costs also shift resources from business expansion, which means fewer new job opportunities for the unemployed.

Annual Cost: $392.6 million

Implementation Cost: $3.5 billion

September 12, 2012: *Securities and Exchange Commission, "Disclosure of Payments by Resource Extraction Issuers"*

This Dodd–Frank rule requires issuers of securities who are engaged in the development of oil,

natural gas, or minerals to include information in an annual report relating to any payment made by the issuer, a subsidiary, or an entity under the control of the issuer to a foreign government or the U.S. government for commercial development of these resources. The rule also requires resource-extraction issuers to provide information about the type and total amount of such payments made for each project related to the commercial development of oil, natural gas, or minerals, and the type and total amount of payments made to each government.

Annual Cost: $288.6 million
Implementation Cost: $1 billion

September 27, 2012: *Environmental Protection Agency, "Regulation of Fuels and Fuel Additives: 2013 Biomass-Based Diesel Renewable Fuel Volume"*

This rule establishes the volume of biomass-based diesel to be used in setting annual percentage standards under the renewable fuel standard program for years after 2012. In this action, the EPA set a volume of 1.28 billion gallons for 2013. The quota increase will mean much higher fuel prices for drivers, and significant cost pressures on farmers and ranchers who will compete with refiners for grain—supplies of which will be limited due to recent drought. The mandate strains family budgets by increasing the cost of both food and gasoline.

Annual Cost: $317 million

October 15, 2012: *Environmental Protection Agency and Department of Transportation, National Highway Traffic Safety Administration, "2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards"*

This 893-page joint rule establishes automotive fuel-economy standards for light-duty vehicles for model years 2017 and beyond. The rules require an average fuel economy of 54.5 miles per gallon in 2025. The measure is expected to increase the sticker price of a new vehicle by more than $1,800.

Annual Cost: $10.8 billion

January 11, 2013: *Federal Communications Commission, "Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services"*

This order requires telecommunications companies to submit a range of data to the government to measure the level of competition in the market.

Annual Cost: No cost analysis by commission

January 15, 2013: *Environmental Protection Agency, "National Ambient Air Quality Standards for Particulate Matter"*

This regulation imposes a stricter standard for annual particulate matter 2.5 (PM 2.5) from 15 micrograms per cubic meter (μg/m3) to 12 μg/m3. It retains the 24-hour PM 2.5 standard at a level of 35 μg/m3. The EPA is retaining the current 24-hour PM 10 standard. To the extent communities are deemed "out of compliance" with the stricter standard, the government could constrain business growth—and the jobs that would otherwise be created.

Annual Cost: $201.5 million

Appendix C: Major Rules Decreasing Regulatory Burdens (1/21/2012–1/20/2013, Cost totals in constant 2010 dollars)

May 14, 2012: *Department of Transportation, Federal Railroad Administration, "Positive Train Control Systems"*

This final rule removes regulatory provisions that require railroads to either conduct further analyses or meet certain risk-based criteria in order to be relieved of requirements to implement "positive train control" (PTC) systems (which automatically route trains to avoid collisions). These criteria include whether track segments are used to transport poison or toxic-by-inhalation (PIH) materials, or are not used for intercity or commuter rail passenger transportation.

Annual Cost Savings: $31 million

August 22, 2012: *Department of the Interior, Bureau of Safety and Environmental Enforcement, "Oil and Gas and Sulfur Operations on the Outer Continental Shelf—Increased Safety Measures for Energy Development on the Outer Continental Shelf"*

This final rule modifies drilling, well completion, well maintenance, and decommissioning regulations.

Annual Cost Savings: $50.7 million