

WebMemo



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Obama's Red Tape: Tsunami or Ripple?

James L. Gattuso

Are regulations being produced by the Obama Administration at a significantly faster rate than under previous administrations? Not at all, say White House officials, arguing that the growing spool of red tape from Washington is just business as usual. “The costs are not out of line by historical standards,” Cass Sunstein, the director of the White House Office of Information and Regulatory Affairs (OIRA), said last week.¹ Earlier this year, he went even further, writing in *The Washington Post* that “The annual cost of regulations has not increased during the Obama administration.”²

This would be welcome news—if true. But by almost every measure, the Obama Administration has imposed regulations at a faster clip than its predecessors. And despite a much-hyped initiative to root out obsolete rules, regulatory costs are continuing to rise.

Legislators should act to stem this tide by adopting meaningful reforms of the regulatory process, including a requirement that major new rules be explicitly approved by Congress itself.

Sizing up the Tide. Rising regulatory burdens are nothing new. The total cost of regulation, according to OIRA, has increased every year since 1982.³ During the George W. Bush Administration, regulators were particularly active, adding \$60 billion in annual regulatory costs to the economy.⁴

But the Obama Administration has outpaced even that robust regulatory output. Based on reports prepared by regulatory agencies themselves, The Heritage Foundation has calculated that through

the end of March 2011, the Obama Administration added close to \$40 billion in new costs to the economy, more than twice the Bush rate.⁵ Fiscal year 2010 was particularly costly, with \$26.5 billion in new costs, higher than any other year on record.⁶

OIRA's estimates are different, claiming that the Obama Administration's new rules cost less than half that amount—but even that claim leaves Obama's costs far above the level of George W. Bush's. The most that OIRA's Sunstein could claim was that “in its last two years, executive agencies in the Bush administration proposed far higher regulatory costs than did those agencies in the Obama administration in our first two years.”

That claim is disingenuous. The last two years of any administration are always the busiest, as outgoing regulators clean out their inboxes. The first two years are typically the slowest, as the new team is put in place. The attempt to mix early-term apples with late-term oranges is misleading.⁷

False Indicators. More recently, President Obama's regulatory record was defended in an article in *Businessweek*.⁸ The reporters cited OIRA data showing that the office reviewed 613 federal rules

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214 Massachusetts Avenue, NE
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(202) 546-4400 • heritage.org

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during the first 33 months of President Obama's term, 4.7 percent fewer than the 643 reviewed during the equivalent period of the George W. Bush Administration.

But this is a false indicator of red tape. The number of rules *reviewed* is not the same measure as the number of rules adopted. It may be that OIRA is simply letting more rules be published without review. Moreover, the OIRA count includes a large number of rules with little economic impact. OIRA itself has long maintained that the "vast majority" of regulatory burdens are imposed by "economically significant" or "major" rules—those with \$100 million or more in economic impact. The Obama Administration has approved 129 such rules, compared to 90 by the George W. Bush Administration during the same period. Even Bill Clinton's Administration approved only 115 such rules.⁹

Federal Agency Rules. The gap grows larger when accounting for rules imposed by independent agencies, whose members are selected by the President for fixed terms and not subject to direct presidential oversight. These agencies—which range from the Securities and Exchange Commission to the

Federal Communications Commission—have been increasingly prolific in recent years, but because of their status, their regulations are not reviewed or approved by the Office of Management and Budget. Including these agencies, the Obama Administration has imposed 214 major rules through October, compared to 139 in the equivalent period under George W. Bush.¹⁰

The *Businessweek* report dismisses this increase as an effect of inflation eroding the \$100 million threshold for major rules. But inflation has totaled 28 percent over the past eight years—hardly enough to explain the 53 percent increase in major rules.

This surge in regulation is likely to continue. According to the spring Unified Agenda, a semiannual compendium by regulators of upcoming rules, 144 major rules are now in the pipeline, compared to 105 at the end of 2008. But even that was high; from 2001 to 2006, the agenda averaged just over 70 rules.¹¹ These rules cover a wide range of activity, from implementation of Obamacare and financial regulation under the Dodd–Frank law to the new Environmental Protection Agency mandates.

1. See Mark Drajem and Catherine Dodge, "Obama Wrote 5% Fewer Rules Than Bush While Costing Business," *Bloomberg Businessweek*, October 25, 2011, at <http://www.bloomberg.com/news/2011-10-25/obama-wrote-5-fewer-rules-than-bush-while-costing-business.html> (November 4, 2011).
2. Op-ed, Cass Sunstein, "The Smart Approach to Reforming Regulations," *The Washington Post*, June 30, 2011, at http://www.washingtonpost.com/opinions/the-smart-approach-to-reforming-regulations/2011/06/29/AGIGHmsH_story.html (November 4, 2011).
3. Office of Information and Regulatory Affairs, Office of Management and Budget, 2005–2011 *Reports to Congress on the Benefits and Costs of Federal Regulations*.
4. James L. Gattuso and Diane Katz, "Red Tape Rising: A 2011 Mid-Year Report on Regulation," Heritage Foundation *Backgrounder* No. 2586, July 25, 2011, at <http://www.heritage.org/research/reports/2011/07/red-tape-rising-a-2011-mid-year-report>.
5. *Ibid.*
6. James L. Gattuso, Diane Katz, and Stephen A. Keen, "Red Tape Rising: Obama's Torrent of New Regulation," Heritage Foundation *Backgrounder* No. 2482, October 26, 2010, at <http://www.heritage.org/research/reports/2010/10/red-tape-rising-obamas-torrent-of-new-regulation>.
7. See Robert Farley, "Cherry-Picking on Regulation," Factcheck.org, Sept. 22, 2011, at <http://www.factcheck.org/2011/09/cherry-picking-on-regulation/> (November 4, 2011).
8. Drajem and Dodge, "Obama Wrote 5% Fewer Rules Than Bush While Costing Business."
9. *Ibid.*
10. Data from Government Accountability Office Congressional Review Act database, at <http://www.gao.gov/legal/congressact/fedrulen.html> (November 4, 2011).
11. Gattuso and Katz, "Red Tape Rising: A 2011 Mid-Year Report on Regulation."

OIRA Director Sunstein discounts figures from the Unified Agenda, arguing that many of the anticipated rules will never be implemented. That may be true, but if so, it also was true of past agendas. Moreover, if the Administration does not intend to adopt the rules it says it intends to adopt, it should take them off the list. Until they are removed, they remain a serious concern.

Earlier this year, acknowledging the harm imposed by overregulation, President Obama announced what he called a “comprehensive” review of federal rules, aimed at ferreting out costly and unnecessary red tape. The initiative has produced limited success, with the total relief to consumers equaling only a small fraction of the new burdens.

Congressional Review. It is time for Congress to step in to help reverse the regulatory tide. As a first step, it should bar regulators from imposing major new burdens without its specific approval. It should also introduce automatic sunseting of old regulations and enhance Congress’s own ability to assess regulatory costs.

Now is not the time to silence the warnings about the regulatory tsunami. The rise in regulatory burdens, which began long before Obama, has reached the flood stage under his watch. Rather than ignore the danger, policymakers must now address it.

—*James L. Gattuso is Senior Research Fellow in Regulatory Policy in the Thomas A. Roe Institute for Economic Policy Studies at The Heritage Foundation.*