

BACKGROUND

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Red Tape Rising: Obama-Era Regulation at the Three-Year Mark

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Abstract

During the first three years of the Obama Administration, 106 new major federal regulations added more than \$46 billion per year in new costs for Americans. This is almost four times the number—and more than five times the cost—of the major regulations issued by George W. Bush during his first three years. Hundreds more regulations are winding through the rulemaking pipeline as a consequence of the Dodd–Frank financial-regulation law, the Patient Protection and Affordable Care Act, and the Environmental Protection Agency’s global warming crusade, threatening to further weaken an anemic economy and job creation. Congress must increase scrutiny of regulations—existing and new. Reforms should include requiring congressional approval of major rules and mandatory sunset clauses for major regulations.

This paper, in its entirety, can be found at <http://report.heritage.org/bg2663>

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In January 2011, President Barack Obama announced, with much fanfare, a new get-tough policy on overregulation. Acknowledging that “rules have gotten out of balance” and “have had a chilling effect on growth and jobs,” he pledged a comprehensive review of regulations imposed by the federal government.¹ Despite this promise of restraint, however, the torrent of new rules and regulations from Washington continued throughout 2011, with 32 new major regulations.² These new rules increase regulatory costs by almost \$10 billion annually along with another \$6.6 billion in one-time implementation costs.

During the three years of the Obama Administration, a total of 106 new major regulations³ have been imposed at a cost of more than \$46 billion annually, and nearly \$11 billion in one-time implementation costs. This amount is about five times the cost imposed by the prior Administration of George W. Bush.

This regulatory tide is not expected to ebb anytime soon. Hundreds of new regulations are winding through the rulemaking pipeline as a consequence of the vast Dodd–Frank financial-regulation law (the Wall Street Reform and Consumer Protection Act), Obamacare, and the

TALKING POINTS

- The regulatory burden on Americans continued to increase throughout 2011, with 32 new major regulations that increase regulatory burdens imposed at a cost of almost \$10 billion annually. This regulatory excess is evident in lackluster job creation and anemic economic growth.
- During its first three years in office, the Obama Administration unleashed 106 new major regulations that increased regulatory burdens by more than \$46 billion annually, five times the amount imposed by the George W. Bush Administration during its first three years.
- Hundreds more costly new regulations are in the pipeline, many of which stem from the Dodd–Frank financial regulation statute and Obama’s health care legislation.
- President Obama’s “retrospective review” initiative, intended to rein in unnecessary rules, has yielded few meaningful results.
- Congress must increase scrutiny of regulations—both old and new—including requiring congressional approval of major rules and sunset clauses for each major regulation.

Environmental Protection Agency's global warming crusade, threatening to further weaken an anemic economy and job creation.

Regulatory Burdens Harm Everyone

In much the same way that high taxes hamper investment and innovation, escalating regulatory costs undermine the American economy. Small businesses in particular are under siege. When surveyed in December 2011 about their single biggest problem by the National Federation of Independent Business, 19 percent of respondents cited "regulations and red tape," up from 15 percent a year ago, and second only to "poor sales."⁴

But regulations are not just a problem for entrepreneurs. American workers and their families have been hit hard by the persistent lack of job creation that results, in part, from regulatory excess. Meanwhile, regulatory costs are passed on to consumers in the form of higher prices and limited product choices. For example, last year's price controls on the fees that banks may charge to process debit-card

transactions have prompted cancellation of customer rewards programs and free services, as well as higher fees on checking accounts and credit cards.⁵

Tracking the New Burdens.

Neither Congress nor the Administration keeps tabs on the total number and cost of regulations. But by mining the Federal Register and various government databases, new regulations may be identified and regulatory costs calculated. During 2011, the Obama Administration completed a total of 3,611 rulemaking proceedings, according to the Federal Rules Database maintained by the Government Accountability Office (GAO), of which 79 were classified as "major," meaning that each had an expected economic impact of at least \$100 million per year.⁶ Of those, 32 increased regulatory burdens (defined as imposing new limits or mandates on private-sector activity).⁷ Just five major actions decreased regulatory burdens. The remainder of the rules adopted were non-regulatory in nature, such as those setting spending criteria for government programs.

Regulations adopted in 2011 cost Americans some \$10 billion in new annual costs, according to estimates by the regulatory agencies.⁸

Overall, from the start of the Obama Administration to January 20, 2012, a total of 10,215 rulemaking proceedings were completed. Those included 244 rulemakings classified as "major," of which 106 increased burdens on private-sector activity. Only 11 major rulemaking actions decreased regulatory burdens. The estimated cost of these new burdens tops \$46 billion.⁹

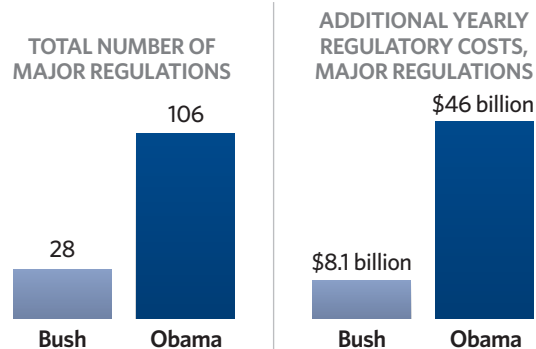
Obama v. Bush. The total number of rulemaking proceedings during the first three years of the Obama Administration (10,215) is slightly less than the total undertaken during the first three years of the Bush Administration (10,674). This led President Obama to assert in his January 2012 State of the Union address that "I've approved fewer regulations in the first three years of my presidency than my Republican predecessor did in his."¹⁰ But looking only at the total number of rulemakings provides a misleading picture. While some have substantial impact, the vast majority of the thousands of

1. "Presidential Documents: Executive Order 13563 of January 18, 2011—Improving Regulation and Regulatory Review," *Federal Register*, Vol. 76, No. 14, January 21, 2011, pp. 3821–3823, at http://www.reginfo.gov/public/jsp/Utilities/EO_13563.pdf (March 1, 2012).
2. Rules classified as "major" in the Government Accountability Office's Federal Rules Database, and which impose a mandate or restriction on private-sector activity. See Appendix A.
3. *Ibid.*
4. William C. Dunkelberg and Holly Wade, NFIB Small Business Economic Trends *Monthly Report*, December 2011, at <http://www.nfib.com/Portals/0/PDF/sbet/sbet201112.pdf> (March 1, 2012).
5. Diane Katz, "Here Comes the Durbin Tax," Heritage Foundation *The Foundry*, September 30, 2011, at <http://blog.heritage.org/2011/09/30/here-comes-the-durbin-tax/> (March 1, 2011).
6. "Major" is the term used in the Congressional Review Act of 1995 to designate rules which must be transmitted by the Government Accountability Office to Congress for review. It is similar, but not identical, to the term "economically significant," which is used in to designate executive branch rules for which regulatory impact analyses must be prepared by agencies and reviewed by the Office of Management and Budget.
7. See Appendix A for the methodology.
8. New costs totaled \$10.1 billion. Minus \$212 million from rulemaking proceedings which lessened burdens, the total net new burden is \$9.9 billion.
9. New costs over the three-year period totaled \$48.1 billion. Minus \$1.8 billion from rulemaking proceedings which lessened burdens, the total net new burden is \$46.3 billion.

CHART 1

Major Regulations Under Obama: More and Costlier than Under Bush

Figures shown are for first three years of the George W. Bush and Obama Administrations.



Source: Heritage Foundation calculations based on data from the U.S. Government Accountability Office, GAO Federal Rules Database Search, at <http://www.gao.gov/legal/congressact/fedrulen.html> (February 21, 2012). See Appendix A for methodology.

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rules adopted each year are routine actions, such as setting payment rates for Medicare or aviation maintenance bulletins.

It is also important to distinguish between rulemakings that increase regulatory burdens on businesses and individuals and those that do not. During the early 2000s, for example, the Federal Communications Commission adopted hundreds of rules related to freeing radio spectrum for commercial use, actions that generally *eased* government constraints on the private sector. Those rulemakings alone erase most of the gap in total rulemaking between Obama and Bush.

Taking these factors into account, a far clearer picture of relative regulatory activity emerges. According to Heritage Foundation calculations using the GAO database, the George W. Bush Administration adopted 28 major regulations in its first three years, barely a quarter of the 106 imposed by the Obama

Administration during its first three years. In terms of cost, the gap was even wider, with the Bush Administration imposing \$8.1 billion in new annual regulatory costs compared to the \$46 billion imposed during the Obama years to date, a five-to-one ratio.¹¹

Excessive regulation, of course, cannot be blamed on the White House alone. A great many of the rules and regulations imposed each year are mandated by Congress, and many others are made possible by intentionally ambiguous statutory language. Others are promulgated by so-called independent agencies not subject to White House control (although they are run by presidential appointees). Regardless of responsibility, the result is the same: more burdens for Americans and the U.S. economy.

The New Regulations of 2011

The 32 regulations that increased regulatory burdens adopted by

federal agencies in 2011 covered a broad range of activity, including energy standards for fluorescent ballasts, refrigerators, freezers, clothes dryers, and air conditioners; testing and labeling requirements for toys; limits on automotive emissions of “greenhouse gases”; employer requirements for posting federal labor rules; more explicit warnings for cigarette packaging; health plan eligibility standards under Obama’s health care legislation; expanded employment requirements for the disabled; and higher minimum wages for foreign workers.

The largest proportion of regulations by far stemmed from the 2010 Dodd–Frank financial-regulation statute, which was responsible for 12 major rules increasing burdens in 2011, including six from the Securities and Exchange Commission, five from the Commodity Futures Trading Commission, and one from the Federal Reserve. Hundreds more Dodd–Frank rules remain to be written.

The most expensive regulation of 2011 was imposed by the Environmental Protection Agency (EPA), which issued a total of five major regulations at a cost of more than \$4 billion annually. Among the new regulations are three that impose stricter limits on industrial and commercial boilers and incinerators, at a total cost of \$2.6 billion annually for compliance and \$5.8 billion for one-time implementation costs. The EPA had postponed the new rules pending reconsideration by the agency and court review. However, in a legal challenge

10. Technically, the President only “approves” rules which are reviewed by the Office of Management and Budget, which only looks at certain rules, and none by independent agencies. Of these, 2,010 were approved during the first three years of President Obama’s term, four fewer than the 2,014 approved during President Bush’s first three years. See Office of Management and Budget, Office of Information and Regulatory Affairs, at <http://www.reginfo.gov/public/>.

11. This includes \$9.0 billion in total new annual costs, minus \$920 million in rulemaking proceedings lessening burdens.

by environmental groups, the U.S. District Court for the District of Columbia vacated the agency's administrative stay in January, making the National Emission Standards for Hazardous Air Pollutants (the Boiler MACT) immediately enforceable (although EPA officials have stated that they would not enforce it while the agency modifies the regulation).¹²

In other court action, the Court of Appeals for the D.C. Circuit has delayed implementation of more stringent limits on emissions from coal-fired power plants pending court review. The Cross-State Air Pollution Rule, issued in August, is estimated by the EPA to cost \$810 million annually. The State of Texas challenged the rule, claiming that the EPA used faulty assumptions in devising the standards.¹³

More stringent energy conservation standards for refrigerators and freezers also rank among the most costly regulations of 2011. Imposed by the Department of Energy, the mandatory standards will increase regulatory costs by nearly \$1.4 billion annually. Energy conservation standards for furnaces and air conditioners will cost an additional \$650 million per year, while requirements for fluorescent ballasts will add \$363 million more in costs annually.

Agencies Understate Costs. The actual cost of these new regulations is almost certainly higher than the totals reported here. This is largely because the agencies that perform

the analyses have a natural incentive to minimize or obfuscate the costs of their own regulations. For some, costs are only partially quantified; for others, not quantified at all. But even quantified costs may often fail to capture the true impacts, as regulators cannot estimate intangibles, the costs of which could dwarf the direct compliance burden. Such undefined costs are inherent in many of the regulations adopted under Dodd-Frank. For instance, in the analysis for its rule providing for shareholder approval of executive compensation, the cost of holding a proxy vote is estimated, but the far larger cost is the risk of losing executive talent, a cost that is probably unquantifiable, but has very real impact. Other intangibles, such as the Fairness Doctrine's infringement on free speech or loss of religious liberty associated with Obamacare insurance mandates, are even more difficult to quantify.

Moreover, some rules categorized as "non-major" by regulators are in fact quite substantial. For instance, last September, the Federal Communications Commission (FCC) adopted "net neutrality" rules, which impose broad restrictions on Internet service providers. These new rules, which have been vigorously debated for years, will have vast impact on how the Internet is managed, yet the FCC did not flag them as "major."

In many cases, the quality of the cost analysis is substandard. In his

final act last January as inspector general of the Securities and Exchange Commission (SEC), David Kotz bluntly criticized the SEC's cost-benefit analyses as "ambiguous" and "internally inconsistent."¹⁴ In a case decided in 2011, the U.S. Court of Appeals for the D.C. Circuit threw out the SEC's regulation on proxy voting after concluding that

[T]he Commission inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters.¹⁵

This is no small matter considering that the SEC issued 21 percent of the new major regulations in 2011 that increased burdens, and reported less than 1 percent of the costs.

The EPA is also notorious for understating costs. Last July, the agency finalized its Cross-State Air Pollution Rule, which imposed more stringent emissions limits on power plants in 27 states, estimating the cost at \$800 million annually. A number of other sources—some tied to the affected industry, some not—forecast much worse impacts. According to the Brattle Group, an economic consulting firm that works with the electrical power industry,

12. David L. Rieser, Neal J. Cabral, Gordon R. Alphonso, D. Cameron Prell, and Dana P. Palmer, "United States: Boiler MACT: Now What?" Mondaq, January 18, 2012, at <http://www.mondaq.com/unitedstates/x/161326/Clean+Air+Emissions/Boiler+MACT+Now+What> (March 1, 2012).

13. Eileen O'Grady, "Court Delays EPA Rule on Coal Plants," Reuters, December 31, 2011, at <http://uk.reuters.com/article/2011/12/31/us-utilities-epa-idUKTRE7BT17420111231> (March 1, 2012).

14. Sarah N. Lynch, "Exiting Watchdog Sees Flaws in SEC's Rulewriting," Reuters, January 30, 2012, at <http://www.reuters.com/article/2012/01/30/us-sec-cost-benefit-report-idUSTRE80T0IV20120130> (March 1, 2012).

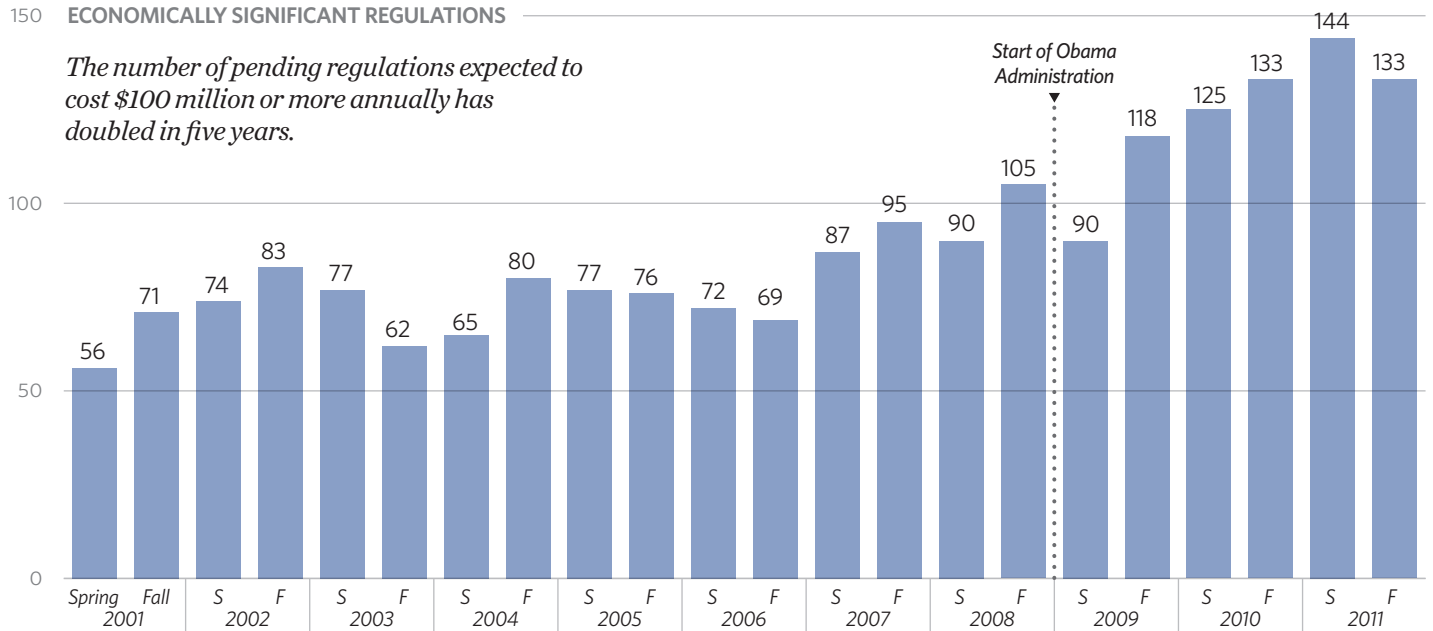
15. *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir., 2011).

CHART 2

More Costly Regulations in the Pipeline

150 ECONOMICALLY SIGNIFICANT REGULATIONS

The number of pending regulations expected to cost \$100 million or more annually has doubled in five years.



Source: Data obtained from Office of Information and Regulatory Affairs, Office of Management and Budget, “Unified Agenda and Regulatory Plan Search Criteria,” at <http://www.reginfo.gov/public/do/eAgendaAdvancedSearch> (February 21, 2012). (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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for instance, the costs of the regulation would total \$120 billion by 2015.¹⁶

Similarly, the EPA pegged the costs of the Boiler MACT at \$2.6 billion annually. The Council of Industrial Boiler Owners, on the other hand, estimates that the regulation will entail compliance costs of \$14.5 billion.¹⁷

The National Labor Relations Board (NLRB) likewise minimized the cost of its new rule requiring additional notifications to employees about employment laws. The board

contended that the regulation will impose a mere \$64.40 per employer, on average, in the first year (for a national total of \$386.4 million). An analysis by the law firm of Baker & McKenzie estimated that each private-sector employee will spend at least one hour in meetings related to the regulation, resulting in a productivity loss to the economy of \$3.5 billion—almost 10 times the NLRB figure.¹⁸

Hundreds of New Rules Looming. Dozens more regulations were slated for 2011, but the

Administration failed to meet statutory deadlines. According to business consultancy Davis Polk, 225 Dodd–Frank rulemaking deadlines have passed.¹⁹ Of these, 164—more than seven of 10—have been missed. Regulators have not yet even released proposals for 24 of the 164 missed rules.

The most recent Unified Agenda (also known as the Semiannual Regulatory Agenda)—a bi-annual compendium of planned regulatory actions as reported by agencies lists 2,576 rules (proposed and final) in

16. Metin Celebi, Frank Graves, Gunjan Bathla, and Lucas Bressan, “Potential Coal Plant Retirements Under Emerging Environmental Regulations,” The Brattle Group, December 8, 2010, at http://www.brattle.com/_documents/UploadLibrary/Upload898.pdf (March 7, 2012).

17. Robert D. Bessette, “Comments of the Council of Industrial Boiler Owners on EPA Proposed Reconsidered Rule ‘National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers,’” February 21, 2012, at http://www.cibo.org/pubs/0790_feb21.pdf (March 7, 2012).

18. “Notification of Employee Rights Under the National Labor Relations Act,” *Federal Register*, Vol. 76, No. 168, August 30, 2011.

19. Davis Polk Regulatory Tracker, “Dodd–Frank Progress Report,” February 2012, at http://www.davispolk.com/files/Publication/37a0b7ea-d818-4da0-b097-99031aaef2ec/Presentation/PublicationAttachment/42334bdb-7f53-41b8-bdc0-9f3460e445b2/Feb2012_Dodd.Frank.Progress.Report.pdf (March 1, 2012).

the pipeline. The largest proportion—505 rulemakings—is from the Treasury Department, the SEC, and the Commodity Futures Trading Commission—all tasked with issuing hundreds of rules under the massive Dodd–Frank statute. The Environmental Protection Agency is responsible for 174 others, while 133 are from the Department of Health and Human Services, reflecting, in part, the regulatory requirements of Obamacare.

Of the 2,576 pending rulemakings in the fall 2011 agenda, 133 are classified as “economically significant.” With each of these expected to cost at least \$100 million annually, they represent a total additional burden of at least \$13.3 billion every year.

This continues the high levels of the Unified Agenda that started in the last two years of the Bush Administration. In the past decade, the number of economically significant rules in the agenda has increased by more than 137 percent, rising from 56 in spring 2001 to 133 in fall 2011.

Meanwhile, rulemaking related to Obama’s health care legislation encompasses more than 150 federal agencies, bureaus, and commissions. And, it appears that the rules are changing faster than regulators can write them. Administrators have granted nearly 2,000 waivers to the new health care regulations, for instance, while the long-term-care insurance plan called for in the legislation has been dropped as completely unworkable.

Rule Books Bulging. Other measures of regulatory activity have also

shown an increase in recent years. One of the most commonly cited measures is the size of the *Federal Register*, the official daily chronicle of regulatory changes. Before any new rule can take effect, it must be published in the *Federal Register*. In 2009, the *Federal Register* was 68,598 pages long. In 2010, it expanded sharply to 81,405. In 2011, the number of pages hit 82,415, a new record.²⁰

The Myth of Retrospective Review

In January 2011, responding to criticism that the nation’s regulatory burden had grown too onerous, and acknowledging the need to eliminate ineffective and harmful regulations, President Obama issued an executive order calling for an agency-by-agency “retrospective review” of regulations. On January 3, 2012, the Administration released progress reports from the agencies.²¹

The Administration claimed that its reforms would, if implemented, reduce regulatory costs by \$10 billion per year. But little or none of this reduction has materialized. Of the four major actions in 2011 that reduced regulatory burdens, none were the product of the regulatory review initiative. Three—involving air cargo screening, family investment advisors, and debit-card price controls—were modifications of recently imposed regulatory burdens. The fourth, the exemption of milk from “oil spill” regulations, was highlighted in the President’s State of the Union speech as an example of the success of the review. In reality, it had been proposed by the EPA in

January 2009, and put on hold when the Obama Administration came into office.

The Administration also claims a number of lesser successes, and many of these are dubious as well. The Department of Energy has listed the development of new energy standards for battery chargers as progress. Department officials say the new federal regulation would ease burdens by replacing state standards. However, it appears that California is the only state that has such a regulation.

Meanwhile, the Environmental Protection Agency cites as progress its imposition of emissions rules in tandem with the fuel-efficiency standards from the National Highway Traffic Safety Administration. It is hard to argue that an additional \$8.5 billion in new annual costs constitutes regulatory relief. But agency officials claim that the joint standards “will allow the auto manufacturers to more efficiently produce one vehicle fleet to meet the requirements of the National Program.” *In fact*, there have never been two different federal rules, so one new one hardly counts as progress.

Many of the claimed reforms are the low-hanging fruit of regulatory excesses that should have been picked long ago. The Department of Transportation only agreed to reform its mandates on anti-collision systems after the railroad industry sued over the issue more than a year ago. The FCC’s official repeal of the Fairness Doctrine cleared the books of a rule that has not been enforced since the late 1980s.

20. Data from the U.S. National Archives and Records Administration, Office of the Federal Register.

21. The White House, “Campaign to Cut Waste: Regulation Reform,” at <http://www.whitehouse.gov/21stcenturygov/actions/21st-century-regulatory-system> (March 1, 2012).

Steps for Congress

Additional congressional oversight is necessary to protect Americans and the economy from runaway regulation. Congress should take steps to increase scrutiny of new and existing regulations to ensure that each is necessary, and that costs are minimized, including:

1. Require congressional approval of new major regulations promulgated by agencies. Under the 1996 Congressional Review Act, Congress has the means to veto new regulations. To date, that authority has been used successfully only once, in 1993, on a Department of Labor rule imposing ergonomics standards. The review process would be strengthened by requiring congressional approval before any major regulation takes effect, as called for under the proposed REINS Act, approved by the House late last year (H.R. 10), and a companion bill by the same name (S. 299), which is pending in committee. Such a system would ensure a congressional check on regulators, as well as ensure the accountability of Congress itself.²²

2. Establish a Congressional Office of Regulatory Analysis. While Congress receives detailed information from the Congressional Budget Office on the state of the budget and on proposals that would affect

the budget, it has no independent source of information on regulatory costs. A non-partisan Congressional Office of Regulatory Analysis would help to fill this gap. Such an office could review the impact of legislative proposals, as well as analyze the cost and effectiveness of regulations adopted by agencies. In this way, a congressional regulation office would act as both a complement and counterweight to the Office of Information and Regulatory Affairs.²³

The cost of such an office would be minimal, and would pay for itself even if it only reduced the cost of new regulation by 0.5 percent each year.²⁴ To ensure that it would not increase federal expenditures, it should be paid for through a 0.1 percent reduction in the \$50 billion budgeted each year for regulatory agencies.²⁵

3. Establish 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 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.²⁶

Conclusion

Despite the weak economy, the Obama Administration continued to increase the regulatory burden on Americans in 2011, adding 32 major regulations that increase regulatory burdens, almost \$10 billion in annual costs, and \$6.6 billion in one-time implementation costs. From the beginning of the Obama Administration through 2011, a staggering 106 major regulations that increase regulatory burdens have been issued, with costs exceeding \$46 billion. While the President has acknowledged the need to rein in regulation, the steps taken to date have been meager.

The President cannot have it both ways—having identified overregulation as a problem, he must take real and significant steps to rein it in. At the same time, Congress—which shares much of the blame for excessive regulation—must establish critical mechanisms to ensure that unnecessary and excessively costly regulations are not imposed on

22. James L. Gattuso, "Taking the REINS on Regulation," Heritage Foundation *WebMemo* No. 3394, October 13, 2011, at http://thf_media.s3.amazonaws.com/2011/pdf/wm3394.pdf.

23. Legislation to establish such an office, H.R. 214, has been introduced in the House by Representative Don Young (R-AK).

24. Assumes a cost of \$50 million, approximately the same amount that the Congressional Budget Office assumes.

25. As estimated in Susan Dudley and Melinda Warren, "Fiscal Stalemate Reflected in Regulators' Budget: An Analysis of the U.S. Budget for Fiscal Years 2011 and 2012," George Washington University Regulatory Studies Center and Washington University in St. Louis Weidenbaum Center, *Regulators' Budget Report* No. 33, May 11, 2011, at http://wc.wustl.edu/files/wc/2012_Regulators_Budget_2.pdf (March 1, 2012).

26. Legislation to require agencies to conduct such periodic review, H.R. 3392, has been introduced in the House by Representative Benjamin Quayle (R-AZ).

the U.S. economy and Americans. Without decisive steps, the costs of red tape will continue to grow, and the economy—and average Americans—will be the victims.²⁷

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27. This paper is the sixth in an ongoing series of reports 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 *Backgrounders* No. 1801, September 28, 2004, at <http://www.heritage.org/Research/Regulation/bg1801.cfm>; (2) Gattuso, "Red Tape Rising: Regulatory Trends in the Bush Years," Heritage Foundation *Backgrounders* No. 2116, March 25, 2008, at <http://www.heritage.org/research/regulation/bg2116.cfm>; (3) Gattuso and Stephen A. Keen, "Red Tape Rising: Regulation in the Obama Era," Heritage Foundation *Backgrounders* No. 2394, updated April 8, 2010, at <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 *Backgrounders* No. 2482, October 26, 2010, at <http://www.heritage.org/research/reports/2010/10/red-tape-rising-obamas-torrent-of-new-regulation>; and (5) Gattuso and Katz, "Red Tape Rising: A 2011 Mid-Year Report on Regulation," Heritage Foundation *Backgrounders* No. 2586, July 25, 2011, at <http://www.heritage.org/research/reports/2011/07/red-tape-rising-a-2011-mid-year-report>.

Appendix A

Methodology

Data on the number and cost of regulations are based on rules reported to Congress by the Government Accountability Office (GAO) pursuant to the Congressional Review Act of 1996 and available from the GAO's Federal Rules Database (<http://www.gao.gov/legal/congressact/fedrule.html>). Rules included are those categorized as "major." All such rules appearing in the database as of February 29, 2012, are included. Rules adopted before that date, but not yet posted in the GAO database, are not 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.

The GAO database includes rule-makings from all agencies, including independent agencies, such

as the Federal Communications Commission and the Securities and Exchange Commission, which are not required to submit analyses to the Office of Management and Budget for review. 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.

Cost figures are based on Regulatory Impact Analyses conducted by agencies issuing each rule. The agencies' totals were then adjusted to constant 2010 dollars using the GDP deflator at Areppim's "Current to Real Dollars Converter" (http://stats.areppim.com/calc/calc_usdlrx_deflator.php). Adjustments for rules adopted in 2009 and 2010 were made in July 2011; all others were made in February 2012, which result in slight variances due to changes in GDP estimates.

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*. Rules were attributed to particular Administrations based on the Federal Register publication date.

As this study focuses on the cost of major regulations, rather than the cost-benefit trade-off, no benefits or "negative costs" were included. We believe that an awareness of the total costs of regulation being imposed is itself a critical factor in regulatory analysis, in the same way that accounting for federal spending is a critical factor in expenditure analysis. Inclusion of a regulation in our totals, however, is not meant to indicate that it is unjustified. For actions reducing regulatory burdens, we used estimates provided by agencies that described the savings to consumers or society from the action.

Appendix B

Major Rules Increasing Private-Sector Burdens January 1, 2011–January 20, 2012 (All figures in constant 2010 dollars)

- **January 19, 2011: Employment and Training Administration, Department of Labor, “Wage Methodology for the Temporary Non-agricultural Employment H-2B Program.”** Increased minimum-wage rates for foreign workers employed under the H-2B visa program. The final rule was strongly opposed by employers. In a letter to the Department of Labor, the U.S. Chamber of Commerce wrote: “There is nothing in the content of the Final Rule that in any way assists...employers to expand their business and increase hiring. In fact, the effect of the Final Rule is exactly the opposite and will dramatically drive up costs for...employers, in many cases by more than 50%, which will end up destroying jobs for U.S. workers.”²⁸
Annual Cost: \$847.4 million
- **January 19, 2011: National Highway Traffic Safety Administration, Department of Transportation, “Federal Motor Vehicle Safety Standards, Ejection Mitigation.”** Required modification of air bags and window design to reduce the possibility of vehicle occupants being ejected in a crash. New standards will increase the average sticker price of cars and light trucks by \$53 to \$200.
Annual Cost: \$511.8 million
- **January 25, 2011: Securities and Exchange Commission, “Issuer Review of Assets in Offerings of Asset-Backed Securities.”** Implemented a provision of Dodd–Frank requiring issuers who register the offer and sale of an asset-backed security (ABS) to review the assets underlying the ABS. Critics argued that the new rule will “only cause the market to seize up further, rather than get credit flowing again as intended.”²⁹
(Note: The SEC’s cost figure only represents the cost of “outside” professional help, and not the estimated 286,016 additional work hours necessary to comply, or three-quarters of the total “internal” work required).
Annual Cost: \$8.4 million
- **January 26, 2011: Securities and Exchange Commission, “Disclosure for Asset-Backed Securities Required by Section 943 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.”** Required securitizers of asset-backed securities to disclose fulfilled and unfulfilled repurchase requests. Adopted concurrently with the asset-backed security rule above.
- **February 2, 2011: Securities and Exchange Commission, “Shareholder Approval of Executive Compensation and Golden Parachute Compensation.”** Implemented section 951 of Dodd–Frank requiring companies to conduct a separate shareholder advisory vote to approve executive compensation. Many predict that such requirements will make it more difficult for U.S. companies to recruit and retain executives.
Annual Cost: \$7.8 million
- **March 21, 2011: Environmental Protection Agency, “Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units.”** Established new standards of performance and emission limits for solid waste incinerators. A petition to stay the rule by a number of industry associations noted “substantial uncertainty as to the applicability of the final rules”; “key elements... not supported by the underlying data”; and “several of the emissions standards are so stringent that companies predict that no
Annual Cost: \$2.2 million
Initial Cost: \$23 million

28. Letter from Randal K. Johnson and Michael W. Dendas, U.S. Chamber of Commerce, to William L. Carlson, U.S. Department of Labor, March 21, 2011, at <http://www.uschamber.com/sites/default/files/comments/US%20Chamber%20H-2B%20Wage%20Phase-In%20Comments%20Final%203-21-11.pdf> (March 1, 2012).

29. Ben Protes, “S.E.C. Approves New Rules for Asset-Backed Securities,” *Dealbook (The New York Times)*, January 20, 2011, at <http://dealbook.nytimes.com/2011/01/20/s-e-c-approves-new-rules-for-asset-backed-securities/> (March 1, 2012).

viable means of complying with them will be devised.”³⁰

Annual Cost: \$286.2 million
Initial Cost: \$721.7 million

■ **March 21, 2011: Environmental Protection Agency, “National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters.”**

Established new emissions standards for hundreds of thousands of commercial, institutional, and industrial boilers. The Council of Industrial Boiler Owners pegged the total cost of the regulation at \$14.5 billion. The U.S. Small Business Administration warned that the rules would cause “significant new regulatory costs” for businesses, institutions, and municipalities across the country. A Commerce Department analysis reportedly concluded that the rules as originally configured would cause job losses of 40,000 to 60,000—much greater than the EPA had claimed.³¹

Annual Cost: \$1.8 billion
Initial Cost: \$5.2 billion

■ **March 21, 2011: Environmental Protection Agency, “National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional**

Boilers.” Same as above, but for smaller facilities.

Annual Cost: \$546.9 million

■ **March 25, 2011: Equal Employment Opportunity Commission (EEOC), “Regulations to Implement the Equal Employment Provisions of the Americans with Disability Act, As Amended.”**

Expanded the definition of the term “disability,” and delineated the extra accommodations that employers must provide to disabled employees and customers. Critics note that the commission, for the first time, listed specific medical conditions that will “virtually always” count as covered impairments, thereby unilaterally categorizing tens of millions of Americans as disabled. Moreover, the new regulation treats any impairment—no matter how brief in duration—as a covered disability. Employment attorneys say the changes will burden employers with compliance challenges as well as with litigation that will inevitably follow the EEOC’s expansive approach.³²

Annual Cost: \$121.5 million

■ **April 21, 2011: Office of Energy Efficiency and Renewable Energy, Department of Energy, “Energy Conservation Program: Energy Conservation**

Standards for Residential Clothes Dryers and Room Air Conditioners.” Increased energy conservation standards for residential clothes dryers and room air conditioners. Will raise the cost of home appliances.
Annual Cost: \$161.8 million

■ **April 25, 2011: Federal Reserve Board, “Truth in Lending.”**

Instituted a higher APR threshold for determining whether “jumbo” mortgage loans secured by a first lien on a consumer’s principal dwelling are higher-priced mortgage loans for which an escrow account must be established. According to the Small Business Administration’s Office of Advocacy, “These burdensome changes may lead to small entities leaving the mortgage industry which could have a negative impact on the availability of mortgages, competition and the consumer.”³³

Annual Cost: No estimate provided by the Federal Reserve Board.

■ **June 3, 2011: Office of the Secretary, Department of the Treasury, “Regulations Governing Practice Before the Internal Revenue Service.”**

Required IRS certification of tax preparers.

Annual Cost: \$47.5 million

30. Petition to the EPA, April 27, 2011, at <http://shopfloor.org/wp-content/uploads/2011/04/Boiler-MACT-CISWI-Administrative-Stay-Request-4-27-11-w-Appx.pdf> (March 1, 2012).

31. Diane Katz, “EPA’s Boiler MACT Rules Still a Threat,” Heritage Foundation *WebMemo* No. 3271, May 25, 2011, at <http://www.heritage.org/research/reports/2011/05/epas-boiler-mact-rules-still-a-threat>.

32. Seyfarth Shaw, LLP, “New ADA Regulations Issued: EEOC Rules Mean Virtually Everyone Is Disabled,” *Uncomplicating Management*, April 3, 2011, at <http://rickdacri.wordpress.com/2011/04/03/new-ada-regulations-issued-eEOC-rules-mean-virtually-everyone-is-disabled/> (March 1, 2012).

33. Letter from Winslow Sargeant, chief counsel for advocacy, to The Honorable Jennifer J. Johnson, Federal Reserve, December 23, 2010, at <http://www.sba.gov/content/letter-dated-122310-board-governors-federal-reserve-system> (March 1, 2012).

- **June 22, 2011: Department of Health and Human Services, “Required Warnings for Cigarette Packages and Advertisements.”** Required stark illustrations of smoking risks to be displayed on cigarette packages and in cigarette advertisements. However, Judge Richard Leon of the U.S. District Court for the District of Columbia ruled in February that the mandate violates the First Amendment, finding that the required images constitute direct advocacy to not buy the product rather than warnings that inform consumers about the effects of smoking.³⁴
Annual Cost: None
Initial Cost: \$342.7 million
- **June 27, 2011: Office of Energy Efficiency and Renewable Energy, Department of Energy, “Energy Conservation Standards for Residential Furnaces and Residential Central Air Conditioners and Heat Pumps.”** Set more stringent efficiency standards for home heating and cooling appliances. The regulation is expected to drive up the price of heating and air conditioning equipment. Although the Energy Department claims that these costs will be offset by lower utility bills, others disagree. According to the Air Conditioning Contractors Association, “DOE has created a new regulatory scheme that is ripe for abuse without fully considering the costs of compliance or the exposure to problems.”³⁵
Annual Cost: \$657.5 million
- **June 30, 2011: Department of Housing and Urban Development, “SAFE Mortgage Licensing Act: Minimum Licensing Standards and Oversight Responsibilities.”** Set minimum standards for state licensing and registration of residential mortgage loan originators and requirements for operating the Nationwide Mortgage Licensing System and Registry.
Annual Cost: \$377.1 million (Cost estimate assumes no state regulation; the incremental cost will be lower for companies operating under state regulation. The full amount is counted here because the regulation establishes a cost floor).
- **July 8, 2011: Department of Health and Human Services, “Administrative Simplification: Adoption of Operating Rules for Eligibility for a Health Plan and Health Care Claim Status Transactions.”** As required by Obamacare, established operating standards for the health care industry to facilitate electronic transactions.
Annual Cost: \$547.5 million
- **July 19, 2011: Securities and Exchange Commission, “Rules**
- **Implementing Amendments to the Investment Advisers Act of 1940.”** As called for under Dodd–Frank, expanded the registration threshold for investment advisers, required advisers to hedge funds, and increased reporting requirements for investment advisers.
Annual Cost: \$0.9 million
Initial Cost: \$49.1 million
- **July 20, 2011: Federal Reserve Board, “Debit Card Interchange Fees and Routing.”** Imposed price controls on the fees banks may charge to process debit-card transactions, as authorized under Dodd–Frank. Banking industry claims that losses of \$6.6 billion annually will force cancellation of rewards programs, higher fees on checking accounts, and annual fees for credit cards.³⁶
Annual Cost: No estimate provided by the Federal Reserve Board.
- **August 3, 2011: Securities and Exchange Commission, “Large Trader Reporting.”** Required large traders to register with the SEC, and to comply with new reporting and record-keeping requirements. Aimed at preventing “flash crashes” of the stock markets, such as that occurring in May 2010. There was “significant opposition” to this rule, based on the cost and the effect on foreign competition.³⁷
Annual Cost: \$18 million
Initial Cost: \$37 million

34. *R. J. Reynolds Tobacco Co. v. FDA*, ___ F. Supp 2d __ (D. D.C. 2012).

35. “Comments of the Air Conditioning Contractors of America (ACCA) on the Energy Conservation Standards for Residential Furnaces and Residential Central Air Conditioners and Heat Pumps,” U.S. Department of Energy, Docket No. EERE-2011-BT-STD-0011, at <https://www.acca.org/Files/?id=788> (March 1, 2012).

36. Katz, “Here Comes the Durbin Tax.”

37. Nina Mehta, “Cloak Comes Off Biggest Stock Traders in SEC Monitoring Mandate,” Bloomberg, August 18, 2011, at <http://www.bloomberg.com/news/2011-08-18/cloak-comes-off-biggest-stock-traders-in-sec-monitoring-mandate.html> (March 1, 2012).

- **August 8, 2011: Environmental Protection Agency, “Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals.”** Mandated 27 eastern, midwestern, and southern states to achieve more stringent emissions reductions from power plants. The rule has been challenged by Texas as threatening the reliability of the electrical supply. **Annual Cost: \$846.3 million**
- **August 30, 2011: National Labor Relations Board, “Notification of Employee Rights Under the National Labor Relations Act [NLRA].”** Required employers to post notices informing employees of their rights under the NLRA, and established the size, form, and content of the notice. The U.S. Chamber of Commerce has filed a lawsuit alleging that the regulation violates federal labor and regulatory laws, as well as the First Amendment.³⁸ **Annual Cost: No estimate provided by the NLRB. Initial Cost: \$378.4 million**
- **September 1, 2011: Commodity Futures Trading Commission, “Swap Data Repositories: Registration Standards, Duties and Core Principles.”** Established registration requirements and other obligations for registered swap data repositories, as called for under Dodd–Frank. **Annual Cost: \$60.8 million** (This figure reflects only partial costs. Commission officials say they are unable to estimate the cost accurately “given existing technologies, the current state of the swaps market and the potential growth in the future.”) **Initial Cost: \$118 million**
- **September 15, 2011: National Highway Traffic Safety Administration, Environmental Protection Agency and Department of Transportation, “Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles.”** Set fuel-efficiency and emissions standards for combination tractors, heavy-duty pickups and vans, and vocational vehicles. The regulation is expected to drive up prices for trucks by as much as \$6,000, with the added burden falling heavily on small, independent owner-operators.³⁹ **Annual Cost: \$606.9 million**
- **September 15, 2011: Department of Energy, “Energy Conservation Program: Energy Conservation Standards for Residential Refrigerators, Refrigerator-Freezers, and Freezers.”** Set more stringent energy-efficiency standards for appliances. The Department of Energy claims that the greater efficiency will save consumers money. But critics say the added costs may dissuade consumers from purchasing new appliances, and that it is not the proper role of government to dictate supposed energy savings for consumers that consumers do not bother to capture themselves.⁴⁰ **Annual Cost: \$1.4 billion**
- **November 8, 2011: Commodity Futures Trading Commission, “Derivatives Clearing Organization General Provisions and Core Principles.”** Among other things, established regulatory standards for financial resources; participant and product eligibility; risk management; settlement procedures; treatment of funds; default rules and procedures; rule enforcement; system safeguards; reporting; recordkeeping; public information; information sharing; antitrust considerations; and legal risk. **Annual Cost: \$5.7 million** (This figure reflects only reporting costs. No other cost estimate provided by the commission.)
- **November 8, 2011: Consumer Product Safety Commission, “Testing and Labeling Pertaining to Product Certification.”** Established standards for certification, testing, and labeling of children’s products. **Annual Cost: \$192.9 million** (This figure refers only to “record-keeping.” The actual testing costs are estimated as \$4.7 million)

38. News release, “U.S. Chamber Sues NLRB to Block Notification Rule,” U.S. Chamber of Commerce, September 20, 2011, at <http://www.uschamber.com/press/releases/us-chamber-sues-nlr-block-notification-rule> (March 1, 2012).

39. “New Emissions Rule to Drive Truck Prices Higher,” *Truckers News*, August 9, 2011, at <http://www.truckersnews.com/new-emissions-rule-to-drive-truck-prices-higher/> (March 1, 2012).

40. “Energy Conservation Standards for Residential Refrigerators,” Mercatus Center, George Mason University, Regulatory Report Card, September 27, 2010, at http://mercatus.org/search/apachesolr_search/residential%20refrigerator (March 1, 2012).

per year for each large manufacturer; \$467,015 per year for each small manufacturer; and \$6,222 per year for a small-batch manufacturer.)

- **November 14, 2011: Department of Energy, “Energy Conservation Standards for Fluorescent Lamp Ballasts.”** Established energy-efficiency standards and testing and labeling requirements for fluorescent lamp ballasts. As with other energy conservation standards, critics contend that the touted energy savings are overly optimistic and that it is not the proper role of government to dictate energy savings for consumers. **Annual Cost: \$363 million**
- **November 16, 2011: Securities and Exchange Commission, “Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF.”** Required investment advisers registered with the SEC that advise one or more funds and have at least \$150 million in private-fund assets under management to comply with filing and record-keeping requirements. **Annual Cost: \$59.3 million**
Initial Cost: \$58.8 million
- **November 18, 2011: Commodity Futures Trading Commission (CFTC), “Position Limits for Futures and Swaps.”** Under Dodd–Frank, established federal position limits and limit formulas for 28 physical commodity futures and option contracts and physical commodity swaps that are economically equivalent to such contracts. This regulation was intended to stop excessive speculation in futures markets, but critics question whether speculation is a problem. According to Democratic CFTC member Michael Dunn, the regulation “may actually make it more difficult for farmers, producers and manufacturers to hedge the risks they take in order to provide the public with milk, bread and gas.”⁴¹ **Annual Cost: \$96.4 million**
Initial Cost: \$4.1 million
- **December 19, 2011: Commodity Futures Trading Commission, “Investment of Customer Funds and Funds Held in an Account for Foreign Futures and Foreign Options Transactions.”** Amended CFTC regulations on investment of customer-segregated funds and others related to permitted investments, liquidity requirements, removal of rating requirements, and expansion of concentration limits. **Annual Cost: No estimate provided by the CFTC.**
- **December 27, 2011: Federal Motor Carrier Safety Administration, Department of Transportation, “Hours of Service of Drivers.”** Revised the hours of service regulations to limit the use of the 34-hour restart provision to once every 168 hours, and required that anyone using the 34-hour restart provision have as part of the restart two periods that include 1 a.m. to 5 a.m. The American Trucking Associations has filed suit in federal court to overturn the rule, arguing that even [the DOT’s] “own analyses show that even when they overstate the safety benefits of these changes, the costs created by their rule still outweigh those benefits.”⁴² **Annual Cost: \$470 million**
- **December 29, 2011: Securities and Exchange Commission, “Net Worth Standard for Accredited Investors.”** As required by Dodd–Frank, amended the accredited investor standards to define “accredited investor” to exclude the value of a person’s primary residence on the basis of having a net worth in excess of \$1 million. Other technical amendments. **Annual Cost: No estimate provided by the SEC.**
- **January 9, 2012: Commodity Futures Trading Commission, “Real-Time Public Reporting of Swap Transaction Data.”** As required by Dodd–Frank, established standards and requirements for real-time reporting and public availability of swap transaction and pricing data. **Annual Cost: No figures provided by the CFTC.**
- **January 10, 2012: Office of the Secretary, Department of Health and Human Services, “Administrative Simplification:**

41. Asjlylyn Loder and Silla Brush, “Top U.S. Regulator Approves New Limit on Commodity Speculation in 3-2 Vote,” Bloomberg, October 18, 2011, at <http://www.bloomberg.com/news/2011-10-18/cftc-votes-3-2-to-approve-new-limits-on-commodity-speculation.html> (March 1, 2012).

42. William B. Cassidy, “ATA Takes Anti-Fatigue Driver Work Rule to Court,” *The Journal of Commerce*, February 14, 2012, at <http://www.joc.com/regulation/ata-takes-anti-fatigue-driver-work-rule-court> (March 1, 2012).

Adoption of Standards for Health Care Electronic Funds Transfers and Remittance

Advice.” As required by President Obama’s health care legislation, established adoption of standards for electronic funds transfers.

Annual Cost: \$33 million

- **January 13, 2012: Commodity Futures Trading Commission, “Swap Data Recordkeeping and Reporting Requirements.”** As called for under Dodd–Frank, the rule instituted recordkeeping and reporting requirements for swap data repositories, derivatives-clearing organizations, designated contract markets, swap execution facilities, swap dealers, major swap participants, and swap counterparties who are neither swap dealers nor major swap participants.

Annual Cost: \$1.1 billion

Initial Cost: \$2.5 billion

Major Rules Decreasing Regulatory Burdens on the Private Sector January 1, 2011–January 20, 2012 (All figures in constant 2010 dollars)

- **April 18, 2011: Environmental Protection Agency, “Oil Pollution Prevention; Spill Prevention, Control, and Countermeasure (SPCC) Rule—Amendments for Milk and Milk Product Containers.”** Exempted all milk and milk product containers and associated piping and appurtenances from spill prevention and control requirements.
Annual Savings: \$147.68 million
- **June 29, 2011: Securities and Exchange Commission, “Family Offices.”** Under Dodd–Frank, excluded family offices from definition of investment advisers and redefined family offices for the purposes of that exclusion.
Annual Savings: No figures provided by the SEC.
- **July 20, 2011: Federal Reserve Board, “Debit Card Interchange Fees and Routing.”** Allowed a debit-card issuer to receive an adjustment of 1 cent to its interchange transaction fee if the issuer develops, implements, and updates policies and procedures to identify and prevent fraudulent electronic debit transactions. Adopted concurrently with underlying price control rules on interchange fees.
Annual Savings: No figures provided by the Federal Reserve Board.
- **August 18, 2011: Department of Homeland Security, “Air Cargo Screening.”** Removed third-party validations of cargo screening programs in favor of TSA conducting all assessments for cargo-screening certification.
Annual Savings: \$68.65 million
- **October 25, 2011: Department of Labor, “Investment Advice—Participants and Beneficiaries.”** Largely confirmed exemption to limits on the provision of investment advice to participants and beneficiaries in individual accounts, such as 401(k) plans.
Annual Savings: None