

Background

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Red Tape Rising: A 2011 Mid-Year Report on Regulation

James L. Gattuso and Diane Katz

Abstract: *Following a record year of rulemaking, the Obama Administration is continuing to unleash more costly red tape. In the first six months of the 2011 fiscal year (FY), 15 major regulations were issued, with annual costs exceeding \$5.8 billion and one-time implementation costs approaching \$6.5 billion. No major rulemaking actions were taken to reduce regulatory burdens during this period. Overall, the Obama Administration imposed 75 new major regulations from January 2009 to mid-FY 2011, with annual costs of \$38 billion. There were only six major deregulatory actions during that time, with reported savings of just \$1.5 billion. This flood of red tape will undoubtedly persist, as hundreds of new regulations stemming from the vast Dodd–Frank financial regulation law, Obamacare, and the EPA’s global warming crusade advance through the regulatory pipeline—all of which further weakens an anemic economy and job creation, while undermining Americans’ fundamental freedoms. Action by Congress as well as the President to stem this regulatory surge is essential.*

The Hidden Tax

Most Americans are all too familiar with the income, property, and sales taxes that shrink paychecks and increase the cost of most every product and service. Just as significant—although less visible—are the ever-increasing costs of regulation. Every facet of daily life, including how Americans heat their homes and light their rooms, what food they buy and how they cook it, the toys that occupy their children and the volume of their television commercials, are controlled by govern-

Talking Points

- The regulatory burden on Americans has continued to increase during the first half of FY 2011, with \$5.8 billion in new annual costs and \$6.5 billion in one-time implementation costs.
- Overall, 75 new major regulations costing over \$38 billion annually have been imposed by regulators from the beginning of the Obama Administration to mid-FY 2011.
- More regulations are on the way, with the number of major rules in the pipeline doubling in the past five years.
- The Administration’s regulatory review initiative is a welcome step, but falls far short of what is needed. The approximately \$1 billion in regulatory cost reductions identified in the review so far is only a fraction of the new burdens being imposed.
- Congress must increase scrutiny of new and existing regulations, including requiring congressional approval of new major rules.

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(202) 546-4400 • heritage.org

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ment's ballooning compendium of dos and don'ts. The attendant costs of each one constitutes a "hidden tax."

Many people may think that regulatory costs are a business problem. Indeed, they are, but the costs of regulation are inevitably passed on to consumers in the form of higher prices and limited product choices. Basic items, such as toilets, showerheads, lightbulbs, mattresses, washing machines, dryers, cars, ovens, refrigerators, television sets, and bicycles, all cost significantly more because of government decrees on energy use, product labeling, and performance standards that go well beyond safety—as well as hundreds of millions of hours of testing and paperwork to document compliance.

There is no official accounting of total regulatory costs, and estimates vary. Unlike the budgetary accounting of direct tax revenues, Washington does not track the total burdens imposed by its expansive rulemaking. An oft-quoted estimate of \$1.75 trillion¹ annually represents nearly twice the amount of individual income taxes collected last year.²

Increased Burdens in 2011

The cost of new regulations, however, can be tracked, and it is growing substantially. Following record increases in fiscal year (FY) 2010, regulatory burdens have continued to increase in 2011. Overall, from the beginning of the Obama Administration to mid-FY 2011, regulators have imposed \$38 billion in new costs on the American people, more than any comparable period on record.

In total, according to the Government Accountability Office, 1,827 rulemaking proceedings were completed during the first six months of FY 2011 (between October 1, 2010, and March 31, 2011). Of these, 37 were classified as "significant/substan-

tive" or "major," meaning they each had an expected economic impact of at least \$100 million per year.

Fifteen of those rulemakings increased regulatory burdens (defined as imposing new limits or mandates on private-sector activity).³ No major rulemaking actions decreased regulatory burdens during the first half of fiscal 2011.

The annual costs of the 15 new major regulations total more than \$5.8 billion, according to estimates by the regulatory agencies. In addition, the regulations impose nearly \$6.5 billion in one-time implementation costs.⁴

It should be noted that the additional costs include \$1.8 billion annually for compliance, and one-time implementation expenses of \$5.2 billion, stemming from new emissions limits on industrial and commercial boilers and incinerators. The Environmental Protection Agency (EPA) recently announced it would reconsider these rules, and postponed their effective dates pending that reconsideration. But the rules remain on the books. The postponement will extend until judicial review is concluded or the agency completes its reconsideration, whichever is earlier.⁵ While the reconsideration of these costly rules is welcome, the continuing uncertainty constitutes a significant cost, as businesses are constrained from undertaking expansion, developing new products, or making efficiency improvements.

The totals also include five sets of complex regulations promulgated by the Securities and Exchange Commission (SEC) to control financial institutions. While the SEC estimated the costs imposed by these rules at just over \$180 million, that figure only reflects a minuscule portion of the total burden. For example, costs related to the staff time required to comply with three of the regulations are not included

1. Nicole V. Crain and W. Mark Crain, "The Impact of Regulatory Costs on Small Firms," Small Business Administration *Small Business Research Summary* No. 371, September 2010, at <http://archive.sba.gov/advo/research/rs371.pdf> (July 19, 2011).
2. Council of Economic Advisers, *Economic Report of the President*, Table B-80, February 2011, at <http://www.gpoaccess.gov/eop/2011/pdf/ERP-2011.pdf> (July 19, 2011).
3. The other 22 were largely fiscal in nature, i.e., establishing conditions for federal spending programs, and are not "regulatory" in the common usage of the term.
4. See Appendix A for a more detailed description of the methodology used in this study.
5. 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>.

in the SEC's estimate, although that may constitute three-quarters of the total man hours required to comply. Specifically, the SEC calculated the costs of "outside" professional services needed to fulfill three of the new regulations, but did not include costs for the 317,926 hours of "internal" work that regulatory compliance requires. Perhaps more important, the figures do not include reductions in efficiency or forgone innovation, the costs of which could dwarf the direct compliance burden.⁶

Other notable new rules include expansion of the Americans with Disabilities Act, restrictions on the expenditures of health insurers, and increases in minimum wages for immigrants.

Unprecedented Growth in Red Tape in the Obama Era

The new regulations continue a multiyear trend of heavier burdens placed on the U.S. economy and the American people. This trend did not begin with the presidency of Barack Obama; the Administration of George W. Bush, for example, generated more than \$60 billion in additional annual regulatory costs.⁷

However, the *rate* at which burdens are growing has accelerated under the Obama Administration. During its first 26 months—from taking office to mid-FY 2011—the Obama Administration has imposed 75 new major regulations with reported costs to the private sector exceeding \$40 billion. During the same period, six major rulemaking proceedings reduced regulatory burdens by an estimated \$1.5 billion, still leaving a net increase of more than \$38 billion.

The actual cost of the new regulations is almost certainly higher, for several reasons. First, the reported totals do not include "non-major" rules,

i.e., those deemed unlikely to cost \$100 million or more annually. Moreover, as agencies estimate the impacts of their own rules, costs are routinely minimized. Nor do agencies always analyze the costs of proposed rules. Twelve of the 75 major regulations adopted by the Obama Administration through the end of March 2011 did not include quantified costs.

The regulations imposed include fuel economy and emission standards for passenger cars, light-duty trucks, and medium-duty passenger vehicles, with an annual cost of \$10.8 billion; energy conservation standards for lightbulbs, with an annual cost of \$700 million; constraints on "short sales" of securities, at \$1.2 billion; and a slew of other costly regulations related to the Dodd–Frank financial regulation statute and Obamacare health regulations.

No other President has burdened businesses and individuals with a higher number and larger cost of regulations in a comparable time period. President Bush was in his third year before new costs hit \$4 billion. President Obama achieved the same in 12 months.

More Regulators, Bigger Budgets

In addition to the costs imposed on the private sector, regulations swell the government workforce and fatten the federal budget. According to a report by the Weidenbaum Center on the Economy, Government, and Public Policy and The George Washington University's Regulatory Studies Center, regulatory staff at federal agencies (full-time equivalents) increased about 3 percent between 2009 and 2010, from 262,241 to 271,235, and is estimated to rise another 4 percent—to 281,832—in 2011. Federal outlays for developing and enforcing regulations are also expected to grow by 4 percent this

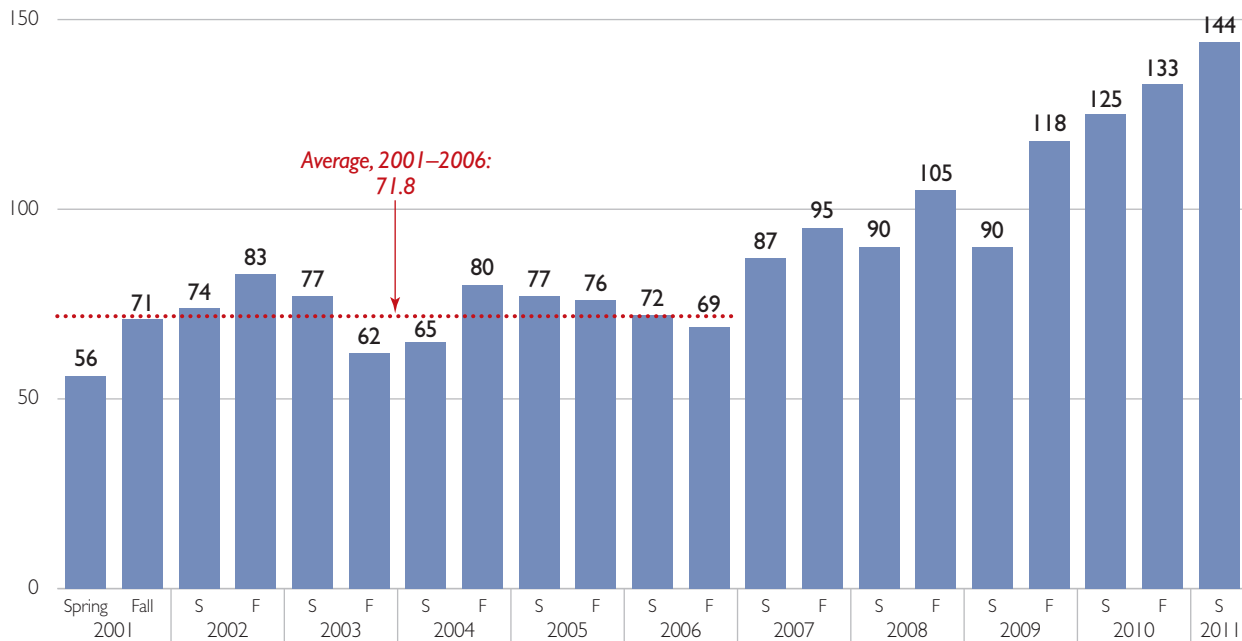
6. See Appendix B for a complete list and descriptions of all major rules issued in the first six months of FY 2011.

7. For prior assessments of regulatory trends, see James L. Gattuso, "Reining in the Regulators: How Does President Bush Measure Up?" Heritage Foundation *Background* No. 1801, September 28, 2004, at <http://www.heritage.org/Research/Regulation/bg1801.cfm>; Gattuso, "Red Tape Rising: Regulatory Trends in the Bush Years," Heritage Foundation *Background* No. 2116, March 25, 2008, at <http://www.heritage.org/research/regulation/bg2116.cfm>; Gattuso and Stephen A. Keen, "Red Tape Rising: Regulation in the Obama Era," Heritage Foundation *Background* No. 2394, updated April 8, 2010, at <http://www.heritage.org/Research/Reports/2010/03/Red-Tape-Rising-Regulation-in-the-Obama-Era>; and Gattuso, Diane Katz, and Keen, "Red Tape Rising: Obama's Torrent of New Regulation," Heritage Foundation *Background* No. 2482, October 26, 2010, at <http://www.heritage.org/research/reports/2010/10/red-tape-rising-obamas-torrent-of-new-regulation>.

More Regulations in the Pipeline

The number of pending regulations that cost \$100 million or more every year has more than doubled in under five years.

Economically Significant Regulations



Source: Data obtained at 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> (July 20, 2011). (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.”)

Chart 1 • B 2586  heritage.org

year, from \$46.9 billion in 2010 (in constant 2005 dollars) to \$48.9 billion.⁸

More Costly Regulations Looming. The torrent of new regulation will not end any time soon. The regulatory pipeline is chock full of proposed rules. The spring 2011 Unified Agenda (also known as the Semiannual Regulatory Agenda) lists 2,785 rules (proposed and final) in the pipeline. Of those, 144 were classified as “economically significant.” With

each of the 144 pending major rules expected to cost at least \$100 million annually, they represent at least \$14 billion in new burdens each year.

This is an increase of 15.2 percent in the number of economically significant rules in the agenda between spring 2010 and spring 2011. Moreover, in the past decade, the number of such rules has increased a whopping 102 percent, rising from 71 to 144 since 2001.⁹

8. Susan Dudley and Melinda Warren, “Fiscal Stalemate Reflected in Regulators’ Budget: An Analysis of the U.S. Budget for Fiscal Years 2011 and 2012,” Weidenbaum Center, Washington University in St. Louis and George Washington University Regulatory Studies Center, May 2011, at http://www.regulatorystudies.gwu.edu/images/pdf/2012_regulators_budget.pdf (July 19, 2011).

9. Data obtained at 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> (July 20, 2011). (Note: Under “Agency or Agencies,” select “All,” and then “Continue.” Under the “Priority” subheading, select “Economically Significant.” Under “Agenda Stage of Rulemaking,” select “Proposed Rule Stage” and “Final Rule Stage.”)

Timid Regulatory Review. In January, responding to criticism that the 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 review of existing regulations. On May 26, the Administration released preliminary results from that review, identifying numerous regulations that could be eased. Among them:

- Modification of an EPA regulation that defined milk as an “oil,” thus requiring dairy spills to be treated as hazardous. According to the agency, exempting milk from the regulation will save dairies around \$1.4 billion over the next 10 years.
- Elimination of an EPA requirement that gas stations maintain gas vapor recovery systems, which is redundant with air pollution controls on cars today. Estimated savings: \$67 million per year.
- Modification of a Department of Transportation (DOT) requirement that railroads only maintain automated anti-collision systems in areas where they are actually needed. Savings: up to \$400 million in implementation costs.

Overall, the Administration claims that the changes identified, if implemented, could reduce regulatory costs by about \$1 billion per year.

But it is too soon for Americans to breathe a collective sigh of regulatory relief. The promised burden reductions are still only a fraction of the new burdens being constantly created. Moreover, many of the reforms identified are the low-hanging fruit of regulatory excesses which should have been plucked long ago. The milk regulation has been in place since the 1970s, and a request to eliminate dairies from the regulations had been submitted to the EPA four years ago. Similarly, the problems with the anti-collision systems mandated by the DOT have long been known. In fact, the DOT was sued over the issue more than a year ago by the railroad industry, and the agency only committed to reforming the mandates as part of a legal settlement.

Lastly, it should be noted that independent agencies, such as the Federal Communications Commission, the Securities and Exchange Commission, and the new Consumer Financial Protection Bureau (considered by many to be the most powerful regulatory agency yet established), did not participate in the initial review process.¹⁰

The Administration’s review of unnecessary regulations is a step in the right direction, but it should be more serious and comprehensive than what has been offered thus far.

Steps for Congress

To protect Americans and the economy against runaway regulators under any Administration, additional oversight is necessary. Specifically, Congress should take several steps to increase scrutiny of new and existing regulations to ensure that each is necessary, and that costs are minimized. Congress should:

1. **Require congressional approval of new major rules promulgated by agencies.** Under the 1996 Congressional Review Act, Congress has the means to veto new regulations. To date, however, that authority has been used successfully only once. Under legislation introduced in the House by Congressman Geoff Davis (R-KY) (H.R. 10) and in the Senate by Senator Rand Paul (R-KY) (S. 299), the review process would be strengthened by requiring congressional approval before any major regulation takes effect. Such a system would ensure a congressional check on regulators, as well as ensure the accountability of Congress itself.
2. **Create a Congressional Office of Regulatory Analysis.** Congress needs the capability to review proposed and existing rules independently, without reliance on the Office of Management and Budget or the regulatory agencies. A Congressional Office of Regulatory Analysis, modeled on the Congressional Budget Office, would provide an important backstop to, and check on, the executive branch’s regulatory powers.

10. Diane Katz, “Reforming Consumer Financial Protection Bureau Necessary to Protect Consumers,” Heritage Foundation WebMemo No. 3216, April 7, 2011, at <http://www.heritage.org/Research/Reports/2011/04/Reforming-Consumer-Financial-Protection-Bureau-Necessary-to-Protect-Consumers>.

Such an office would also help Congress better evaluate the regulatory consequences of the legislation it enacts. While it is easy to blame regulators for excessive rulemaking, much of the problem stems from overly expansive or ill-defined statutory language. A congressional office to review legislation before adoption could help address the problem.

3. **Establish a sunset date for federal regulations.**

While the President has asked agencies to review their existing rules and eliminate those that are unnecessary, these requirements are insufficient. Even the best plans for periodic review will fall short if there are no consequences when an agency fails to adequately scrutinize the regulations it has imposed. The natural bureaucratic tendency is to leave old rules and regulations in place, even if they have outlived their usefulness. To ensure that substantive review occurs, regulations should automatically expire if not explicitly reaffirmed by the agency through a notice and comment rulemaking. As with any such regulatory decision, this re-affirmation would be subject to review by the courts.

Conclusion

Despite the weak economy, the Obama Administration has continued to increase the regulatory bur-

den on Americans in the first half of FY 2011, with 15 new major regulations imposing \$5.8 billion in additional annual costs, as well as \$6.5 billion in one-time implementation costs.

From the beginning of the Obama Administration to the end of March 2011, a staggering 75 new major regulations, with costs exceeding \$38 billion, have been adopted. While the President has acknowledged the need to rein in regulation, the steps taken to date have fallen far short. 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 step in, establishing critical mechanisms and institutions to ensure that unnecessary and excessively costly regulations are not imposed on the U.S. economy and the American people. Without such decisive steps, the costs of red tape will continue to grow, and Americans—and the U.S. economy—will be the victims.

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

APPENDIX A

Data on the number and cost of rules are based on rules reported to Congress by the Government Accountability Office (GAO) pursuant to the Congressional Review Act of 1996. U.S. Government Accountability Office, Federal Rules Database, at <http://www.gao.gov/legal/congressact/fedrulerule.html> (July 19, 2011).

Rules included are those categorized as either “major” or “significant/substantive.” Rules which do not involve regulations limiting activity or mandating activity by the private sector were excluded. Thus, for instance, budgetary rules which set reimbursement rates for Medicaid or conditions for receipt of agricultural subsidies were excluded.

The GAO database includes rulemakings 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 rules.

Cost figures were based on Regulatory Impact Analyses conducted by agencies promulgating each rule. The agencies’ totals were then adjusted to constant 2010 dollars using the GDP deflator. 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 after January 20, 2009, were attributed to the Obama Administration.

In a number of cases, reported costs differ from those reported in previous versions of “Red Tape Rising.” Such changes were made as a result of refinements to our analysis, or to correct errors. The most substantial change was the addition of a rule expanding the application of the Americans with Disabilities Act. Although this rule was published in the *Federal Register* on September 15, it was not reported to the Government Accountability Office until March 15, after our FY 2010 estimates were published.

As this report focuses on the cost of major rules, rather than the cost-benefit trade-off, no benefits or “negative costs” were included in this study. We believe 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 rule in our totals, however, is not meant to indicate that a particular rule is justified. 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 Regulations that Increase Private-Sector Burdens
October 2010–March 2011****October 2010**

- October 14, 2010, Department of the Interior, Bureau of Ocean Energy Management, “Regulation and Enforcement: Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Increased Safety Measures for Energy Development on the Outer Continental Shelf.” **Cost:** \$183.1 million annually.

The interim final regulation amends drilling regulations related to well control, well casing and cementing, secondary intervention, unplanned disconnects, recordkeeping, well completion and well plugging for oil and gas exploration, and development on the Outer Continental Shelf.

- October 20, 2010, Department of Labor, Employee Benefits Security Administration, “Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans.” **Cost:** \$384.4 million annually.

The final regulation requires the disclosure of certain plan and investment-related information, including fee and expense information, to participants and beneficiaries in participant-directed individual account plans.

- October 20, 2010, Securities and Exchange Commission, “Reporting of Security-Based Swap Transaction Data.” **Cost:** \$50.3 million annually; \$6.2 million start-up.

The interim final temporary regulation requires specified counterparties to pre-enactment security-based swap transactions to report certain information to a registered data repository or to the SEC.

November 2010

- November 15, 2010, Securities and Exchange Commission, “Risk Management Controls for Brokers or Dealers With Market Access.” **Cost:** \$112.9 million annually; \$114.4 million start-up.

The final regulation requires brokers or dealers trading securities on an exchange or an alternative trading system to establish, document, and maintain a system of risk management controls and supervisory procedures.

December 2010

- December 1, 2010, Department of Health and Human Services, “Health Insurance Issuers Implementing Medical Loss Ratio Requirements Under the Patient Protection and Affordable Care Act.” **Cost:** \$948.3 million annually; \$48.1 million start-up.

The interim final regulation implements the requirements of Obamacare for insurers to spend a government-regulated ratio of premium revenue on medical care.

- December 28, 2010, Consumer Product Safety Commission, “Safety Standards for Full-Size Baby Cribs and Non-Full-Size Baby Cribs; Final Rule.” **Cost:** \$387 million start-up.

The final regulation adopts new safety standards for baby cribs.

January 2011

- January 19, 2011, Department of Transportation, National Highway Traffic Safety Administration, “Federal Motor Vehicle Safety Standards, Ejection Mitigation; Phase-In Reporting Requirements; Incorporation by Reference.” **Cost:** \$511.8 million annually.

The final regulation establishes a new federal motor vehicle safety standard to reduce the partial and complete ejection of occupants through side windows in crashes, particularly rollover crashes.

- January 19, 2011, Department of Labor, Employment and Training Administration, “Wage Methodology for the Temporary Non-agricultural Employment H-2B Program.” **Cost:** \$847.4 million annually.

The final regulation amends regulations governing the certification for employment of nonimmigrant workers in temporary or seasonal non-agricultural employment. It also revises the methodology by which the Department of Labor calculates the prevailing wages to be paid to H-2B workers and others in connection with a temporary labor certification.

- January 25, 2011, Securities and Exchange Commission, “Issuer Review of Assets in Offerings of Asset-Backed Securities.” **Cost:** \$8.4 million annually. (The cost figure only reflects “outside” professional assistance, and not the costs of an additional 6,968 “internal” burden hours.)

The final regulation implements a Dodd–Frank provision requiring any issuer registering the offer and sale of an asset-backed security to perform and disclose a review of assets underlying the offering.

- January 26, 2011, Securities and Exchange Commission, “Disclosure for Asset-Backed Securities Required by Section 943 of the Dodd–Frank Wall Street Reform.” **Cost:** \$2.2 million annually, plus \$23 million in one-time up-front costs. (The cost figure only reflects “outside” professional assistance, and not the costs of an additional 286,016 “internal” burden hours.)

The regulation implements a Dodd–Frank provision requiring securitizers of asset-backed securities to disclose fulfilled and unfulfilled repurchase requests. It also requires “statistical rating organizations” (credit agencies) to divulge a variety of information about asset-backed securities in any credit rating provided in connection with an offering.

February 2011

- February 2, 2011, Securities and Exchange Commission, “Shareholder Approval of Executive Compensation and Golden Parachute Compensation.” **Cost:** \$7.8 million annually. (The cost figure only reflects “outside” professional assistance, and not the costs of an estimated 24,942 additional hours of “internal” work.)

The final regulation implements a Dodd–Frank provision requiring a separate shareholder advisory vote to approve executive compensation. It also requires companies soliciting votes to approve merger or acquisition transactions to provide disclosure of certain “golden parachute” compensation arrangements and, in some circumstances, to conduct a shareholder advisory vote to approve the golden parachute compensation arrangements.

March 2011

- March 21, 2011, Environmental Protection Agency, “National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers.” **Cost:** \$545 million annually.

The final regulation sets national emission standards for emissions for two “area source” categories: industrial boilers and commercial and institutional boilers.

- March 21, 2011, Environmental Protection Agency, “National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters.” **Cost:** \$1.8 billion annually; \$5.2 billion start-up.

The final regulation establishes emission standards for industrial, commercial, and institutional boilers and process heaters at “major sources” requiring application of the maximum achievable control technology.

- 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.” **Cost:** \$285.3 million annually; \$719.2 million start-up.

The final regulation establishes new source performance standards and emission guidelines for commercial and industrial solid waste incineration units.

- March 25, 2011, Equal Employment Opportunity Commission, “Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, As Amended.” **Cost:** *\$121.5 million annually.*

The regulation and interpretive guidance implements the ADA Amendments Act of 2008. The effect of the changes is to make it easier for an individual seeking protection under the ADA to establish that he or she has a disability.