

# Justice Delayed: The Human Cost of Regulatory Paralysis

United States Senate  
Committee on the Judiciary  
Subcommittee on Oversight, Federal Rights, and Agency Action

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Chairman Blumenthal, Ranking Member Hatch, and Members of the Subcommittee, thank you for the opportunity to appear today. In this testimony, I wish to make three basic points:

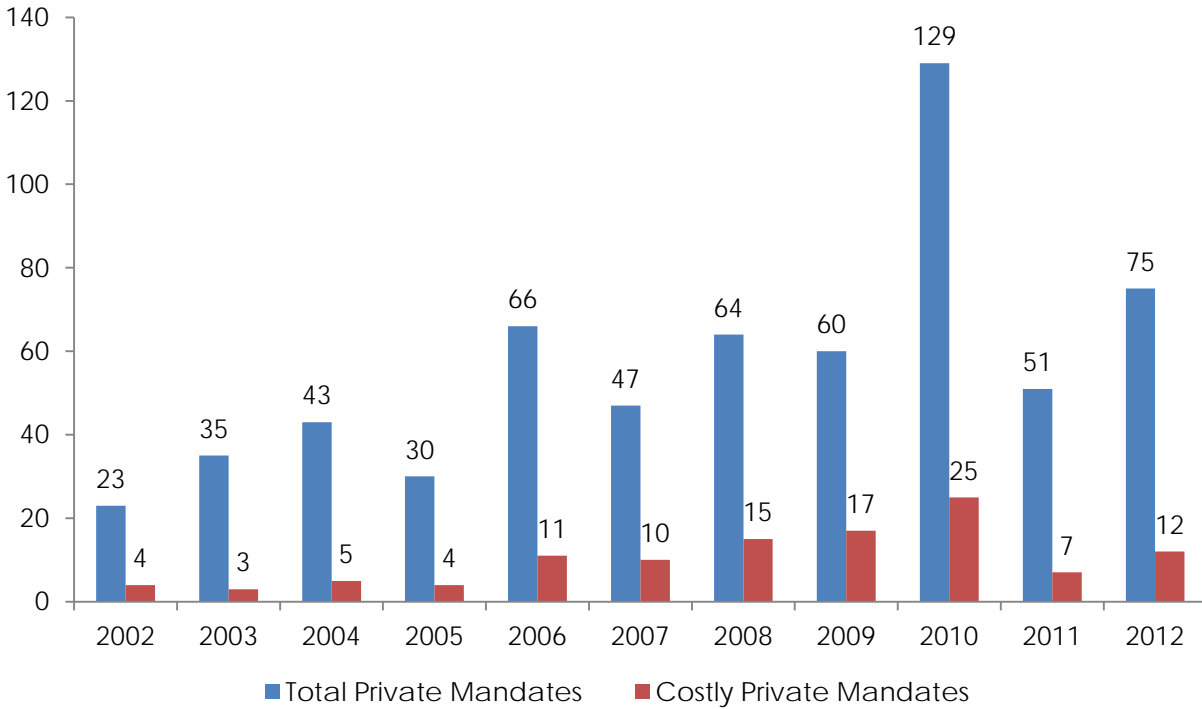
- The number of “major” regulations (those with an impact of \$100 million or more) and the amount of federal paperwork have increased significantly during the past five years,
- Existing regulatory delays are often the product of hundreds of new requirements from Dodd-Frank and the Affordable Care Act, and
- With more than 9,100 different collections of information, the federal government struggles to administer veterans’ benefits, manage the nation’s immigration system, and approve basic private actions.

Let me provide additional detail on each in turn.

## **I. Putting Regulatory Growth in Perspective**

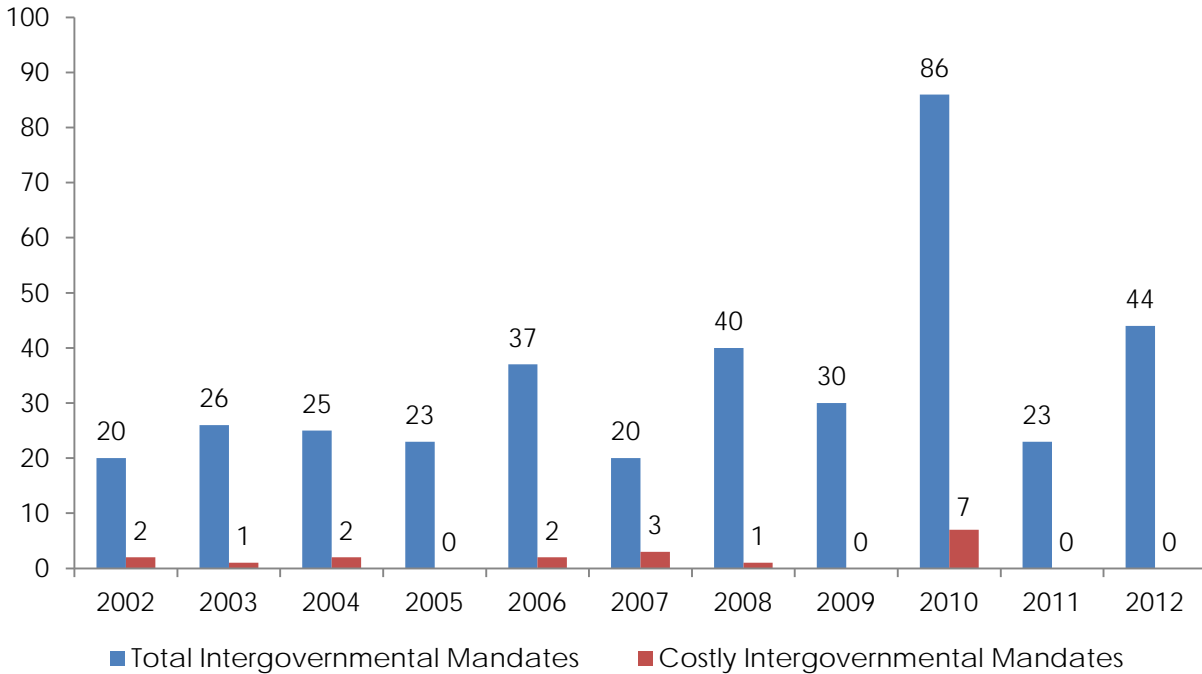
There is serious debate in the policy community about whether the costs and number of federal regulations are increasing. Rather than debate the *ex ante* versus *ex post* estimates and the value of comprehensive cost-benefit analyses, we present the following data, which is from the Congressional Budget Office (CBO) and the Office of Information and Regulatory Affairs (OIRA).

The following two charts display CBO data on the number of private-sector and unfunded mandates contained in congressional legislation from 2002 to 2012. CBO provides this data under the Unfunded Mandates Reform Act (UMRA). There is no doubt that part of the regulatory growth in recent years is a product of legislative mandates. In 2009 and 2010, Congress imposed 189 private-sector mandates; the 129 mandates passed in 2010 was the highest amount CBO has ever recorded.

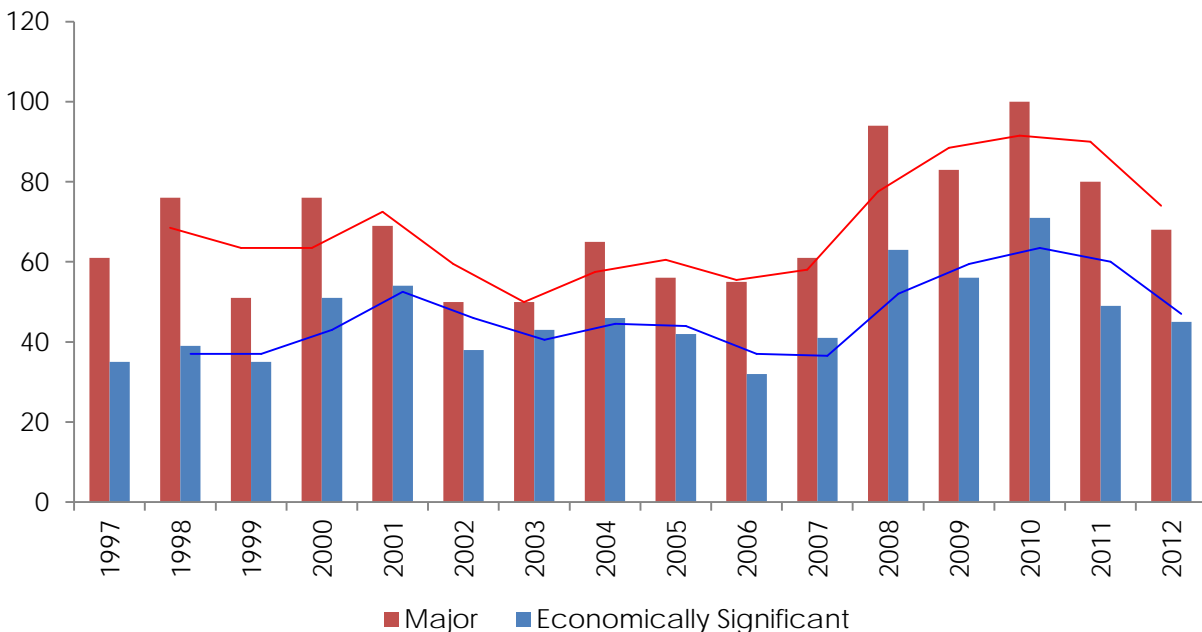


More important than the sheer number of mandates, CBO also records whether mandates exceed the statutory threshold under UMRA (currently at \$150 million). In 2010, Congress passed 25 mandates that would likely exceed the statutory threshold, easily the highest figure on record and more than triple the yearly average from 2002 to 2008.

CBO also tracks the number and extent of unfunded mandates on states and local entities. In 2009 and 2010, Congress passed, and the President signed, 116 unfunded mandates. Although there are few intergovernmental mandates that exceed the statutory threshold (currently at \$75 million), there were seven such instances in 2010, more than the previous five years combined. It is clear that current regulatory burdens have legislative roots of historic proportions.



These figures on mandates are important because they eventually become federal regulations and translate into real costs for private entities and states. The graph below moves past mandates in legislation to “major” and “economically significant” final regulations. Although there are some differences between the two terms, both have a \$100 million economic impact threshold. The Government Accountability Office (GAO) transmits major rule reports to Congress after the agency certifies “major” status. As the chart displays, 2010 was also a record year for federal regulation. The federal government published 100 major rules that year. In addition, there were 71 economically significant regulations in 2010, the highest on record.



Despite the relative slowdown in 2012, the moving average trend line for major rules is still at one of the highest points in history. Some have attributed the decreased regulatory pace in 2012 to election year politics. Although there is no evidence that political actors purposefully stopped some regulations, there was a significant surplus of rules that had been under review at OIRA for more than 90 days. In October of 2012, 84 percent of all rules were under OIRA review for more than 90 days. Today, that figure stands at 55 percent.

Through the first six months of 2013, the federal government has published 31 major rules, putting regulators on pace for approximately 62 by the end of the year. However, the federal government has scheduled (based on Unified Agenda data) several notable rules in the coming months, including five different energy efficiency standards, three major Affordable Care Act rules, and several Dodd-Frank regulations.

## **Growing Red Tape**

Beyond the number and cost of federal rulemakings, the American Action Forum also tracks how federal agencies impose paperwork burden hours. Based on our current data for 2013, the federal government has imposed 85 million paperwork burden hours (54.6 million from final rules and 29.9 million from proposed rules).

In the aggregate, OIRA reports that Americans spend more than 10.34 billion hours annually completing federal paperwork.<sup>1</sup> The supposed cost for this paperwork is \$72.8 billion, or \$7.04 per hour, less than the federal minimum wage. There are two other measures to monetize the nation's 10.34 billion hour burden: the median wage of a "compliance officer" (\$31.23) or the real Gross Domestic Product per hour worked (\$60.59). Using these two figures, the monetized burden of federal paperwork ranges from \$322 to \$626 billion annually. These figures include only the paperwork costs of regulation, not deadweight losses or other capital costs.

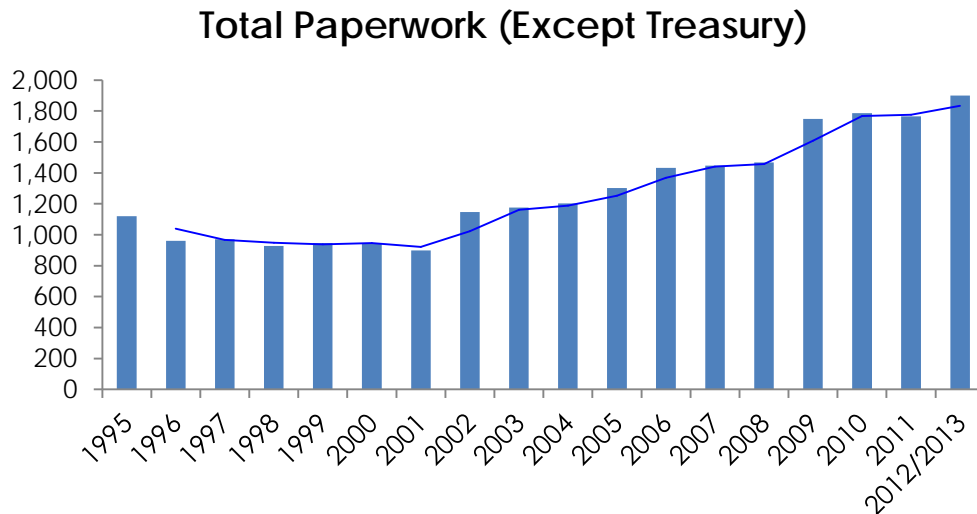
It is undeniable that federal red tape is growing, and will likely continue to trend upwards with the implementation of the Affordable Care Act and Dodd-Frank. Based on the most recent Information Collection Budget of the U.S., the federal government added 355 million hours in the last fiscal year.<sup>2</sup> To put this figure in perspective, assuming a 2,000-hour work year, it would take 177,500 employees to comply with the new paperwork. Added regulatory burdens, however, should not be thought of as a jobs program.

The figure below details the aggregate cabinet-level paperwork burden, with the Department of Treasury excluded. Treasury imposes more than 7.8 billion hours of paperwork, 75 percent of the government-wide total, so a major Treasury collection of paperwork can shift the overall figure. Excluding Treasury gives a more accurate depiction of how government paperwork has changed, rather than a reflection of tax changes at one agency.

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<sup>1</sup> OIRA, Inventory of Currently Approved Information Collections, available at <http://www.reginfo.gov/public/do/PRAReport?operation=11>.

<sup>2</sup> Office of Management and Budget, Information Collection Budget of the United States Government, available at [http://www.whitehouse.gov/sites/default/files/omb/inforeg/icb/icb\\_2012.pdf](http://www.whitehouse.gov/sites/default/files/omb/inforeg/icb/icb_2012.pdf).



The trend in paperwork is continued growth, especially during the past five years. From 1995 to 2008, the non-Treasury related paperwork averaged 1.13 billion hours. During the past four years, that average has risen to 1.8 billion, a 58 percent increase. Assuming the wage rate of a compliance officer, the added non-Treasury paperwork since 2008 has cost \$56.2 billion.

From 1995 to 2001, the non-Treasury burden fell by more than 220 million hours. This demonstrates that the federal government can cut paperwork and still protect public health and safety. The Departments of Labor and Defense have reduced their paperwork burden since 1995 but it is obvious that other agencies have failed to restrain their red tape.

### **OIRA's Report to Congress**

Given the debate over federal regulations, OIRA helped to settle matters when it reported that 2012 was the costliest year on record.<sup>3</sup> At \$19.5 billion (in 2001 dollars), last year surpassed the second highest year by 57 percent. Despite record costs, OIRA failed to report record benefits.

OIRA reported these figures from only 14 rules, or one-third of one percent of all federal rules issued during FY 2012. In comments submitted to OIRA, the American Action Forum reviewed all rules with either monetized costs or benefits.<sup>4</sup> We found OIRA correctly reported total benefits, approximately \$100 billion, but by including all rules, costs rise to \$29.5 billion (in 2001 dollars), an increase of 52 percent over OIRA's high-end cost projection.

We should put these figures in perspective. Based on, CBO's latest strategies for reducing the deficit, "Spending and Revenue Options," raising each tax bracket by one percentage point

<sup>3</sup> 2013 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act, available at [http://www.whitehouse.gov/sites/default/files/omb/inforeg/2013\\_cb/draft\\_2013\\_cost\\_benefit\\_report.pdf](http://www.whitehouse.gov/sites/default/files/omb/inforeg/2013_cb/draft_2013_cost_benefit_report.pdf).

<sup>4</sup> American Action Forum, Comments on 2013 Report to Congress on the Benefits and Costs of Federal Regulations, available at <http://americanactionforum.org/topic/comments-2013-report-congress-benefits-and-costs-federal-regulations>.

would generate \$48 billion annually during the next ten years.<sup>5</sup> Adjusting OIRA's figure to today's dollars yields annual costs of \$25.7 billion, and adjusting our data results in \$38.9 billion in costs. Regulatory costs do not directly translate to tax increases but these new rules are far from trivial. More importantly, regulations never receive the same public scrutiny as major tax changes.

## **II. Regulatory Delays from the Affordable Care Act, Dodd-Frank**

As discussed, Dodd-Frank and the Affordable Care Act have generated substantial regulatory growth within the past three years. With strict legislative timelines and hundreds of new rules, the pace of regulation has exceeded the capacity of regulators to promulgate some rules.

For the Affordable Care Act, the administration has already finalized 96 rules. When we analyzed implementation earlier this year, we found 36 percent of the regulations in proposed form were late, with four rules already missing their final rule deadline.<sup>6</sup> At the third anniversary of the law, the American Action Forum found 29 missed deadlines.

The missed deadlines do not tell the entire regulatory history of the law. Beyond the tax implications and the employer mandate, the administration admits considerable regulatory burdens for small businesses. Under the Regulatory Flexibility Act, agencies must certify whether a regulation will have a "significant economic impact on a substantial number of small entities" (SISNOSE). According to the administration, there were 11 regulations (eight final and three proposed rules) that triggered this SISNOSE threshold.

Although Congress never defined SISNOSE in the Regulatory Flexibility Act, HHS describes it as any regulation that will raise prices or reduce revenues by three to five percent within a five-year period. In other words, there are eleven regulations, and possibly more in the future, that will act as a regulatory tax for small businesses. The initial cost for these measures is \$1.9 billion and 11.3 million paperwork burden hours.

Based on data from OIRA, the Affordable Care Act has substantially increased HHS's paperwork burden. In FY 2009, HHS imposed 494 million hours of paperwork. Today, HHS collects more than 1,180 different OMB control numbers and imposes more than 621 million hours of paperwork, a 25 percent increase. From 1995 to present, HHS's paperwork burden has increased fourfold. In fact, the amount of paperwork might be too much for the agency to manage. According to OIRA data, HHS has violated the Paperwork Reduction Act 154 times in the past three years, more than any other agency.<sup>7</sup>

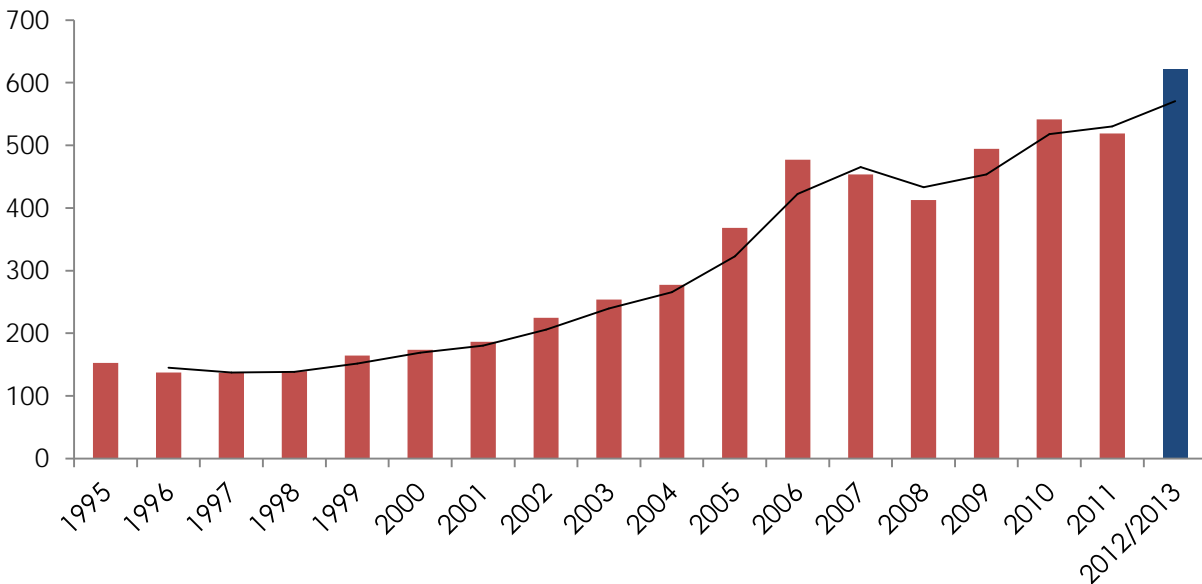
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<sup>5</sup> Congressional Budget Office, Collected Tables for Spending and Revenue Options, available at <http://www.cbo.gov/publication/42307>.

<sup>6</sup> American Action Forum, The Affordable Care Act's Past, Present, and Future, available at <http://americanactionforum.org/topic/health-care-implementation-train-wreck-looming-affordable-care-acts-past-present-and-future>.

<sup>7</sup> Agencies Fail to Comply with Paperwork Reduction Act, available at <http://americanactionforum.org/topic/regulatory-lawbreakers-agencies-fail-comply-paperwork-reduction-act>.

### HHS Paperwork (Millions of Hours)



For Dodd-Frank implementation, the regulatory backlog is less a product of OIRA and more a result of the sheer number of new rules prescribed by the law. According to many estimates, Dodd-Frank will impose approximately 400 regulations. Based on figures from Davis Polk, a law firm that tracks implementation, regulators have already missed 175 deadlines, or 62 percent of the legislative targets; approximately one-third of the law has not yet been proposed.<sup>8</sup>

Quantifying the impact of Dodd-Frank implementation is less certain because many independent agencies omit cost-benefit analyses and are not subject to OIRA review. However, requirements under the Paperwork Reduction Act force agencies to list paperwork burden hours. We have tracked 58.5 million hours from Dodd-Frank to date, with 55 million attributable to final rules. With a median cost of compliance of approximately \$100 per hour for rules that do monetize paperwork compliance, the burden of 58 million hours eclipses \$5.8 billion.

Furthermore, according to OIRA, agencies have finalized 25 major rules implementing Dodd-Frank. The Commodity Futures Trading Commission (CFTC) is responsible for 16 of those 25 major rules. With approximately two-thirds of Dodd-Frank still to be finalized, the number of major rules and paperwork hours will only increase.

### III. Regulatory Duplication and Delay

The focus of this hearing is on delayed rules but regulatory growth adds to duplication within the current system and causes delays for immigrants, veterans, and U.S. companies.

<sup>8</sup> Davis Polk, July 2013 Dodd-Frank Progress Report, available at <http://www.davispolk.com/Dodd-Frank-Rulemaking-Progress-Report/>.



This spring, GAO released its annual report on federal “Fragmentation, Overlap, and Duplication.”<sup>9</sup> The report found 17 areas of duplication, and based on these findings, we replicated GAO’s methodology for overlap in paperwork requirements. The spending equation of government duplication totals approximately \$365 billion, according to Senator Tom Coburn, but regulatory duplication also has a price.<sup>10</sup> Based on the 17 areas of duplication, we found 642 million paperwork hours, \$46 billion in costs, and 990 forms of federal overlap. For example, ten different agencies are involved in renewable energy programs and produce 96 related forms.<sup>11</sup>

This duplication has real implications for Americans interacting with government every day. In a well-documented failure, there are more than 600,000 veterans waiting on benefit claims. These wait times are a result of the surge in veterans applying for benefits and the maze of paperwork in the current system. The American Action Forum found more than 600 different forms relating to veterans’ claims, imposing millions of paperwork burden hours.<sup>12</sup> Some veterans undergo briefings on the application process alone, with the expectation that benefits will not arrive promptly.

The regulatory maze also affects the nation’s broken immigration system. There are more than 150 immigration-related regulations, involving seven different cabinet agencies. The paperwork cost of managing the current system approaches \$30 billion. We found that a hypothetical immigrant’s path to citizenship could involve 16 forms, 18 hours of paperwork, and \$2,500 in direct paperwork costs.<sup>13</sup>

## **OIRA Review, Changes to Rules**

Delays at OIRA might garner plenty of criticism but the office plays a vital role in reviewing agency actions. There are some instances when OIRA failed to check flawed regulations, frustrating conservatives and progressives alike.<sup>14</sup> For example, last year when EPA issued its new biodiesel standard, above the statutory baseline, the agency conceded the rule would cause up to \$52 million in environmental “disbenefits” from dirtier air and water. EPA noted, “Impacts on water quality, water use, wetlands, ecosystems, and wildlife habitats are expected to be directionally negative.”<sup>15</sup> The final rule spent more than two months at OIRA but the office nevertheless approved a rule that imposes significant economic and environmental costs.

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<sup>9</sup> Government Accountability Office, 2013 Annual Report: Actions Needed to Reduce Fragmentation, Overlap, and Duplication and Achieve Other Financial Benefits, available at <http://www.gao.gov/assets/660/653604.pdf>.

<sup>10</sup> Senator Tom Coburn, Letter to Deputy Director Jeffrey Zients, available at [http://www.coburn.senate.gov/public/index.cfm?a=Files.Serve&File\\_id=feba26e1-7102-4a0f-bb55-a91e7477d98f](http://www.coburn.senate.gov/public/index.cfm?a=Files.Serve&File_id=feba26e1-7102-4a0f-bb55-a91e7477d98f).

<sup>11</sup> American Action Forum, Weeding Out Regulatory Duplication, available at <http://americanactionforum.org/topic/weeding-out-regulatory-duplication>.

<sup>12</sup> American Action Forum, Red Tape Challenges to America’s Veterans, available at <http://americanactionforum.org/topic/red-tape-challenges-america%E2%80%99s-veterans>.

<sup>13</sup> American Action Forum, The Intersection of Immigration and Regulation, available at <http://americanactionforum.org/topic/intersection-immigration-and-regulation>.

<sup>14</sup> Sofie Miller, Crony Environmentalism, available at <http://www.cato.org/sites/cato.org/files/serials/files/regulation/2013/3/v36n1-14.pdf#page=1>.

<sup>15</sup> Regulation of Fuels and Fuel Additives: 2013 Biomass-Based Diesel Renewable Fuel Volume, 77 FR 59,459, available at <http://www.federalregister.gov/a/2012-23344/p-70>.

There is a common assumption that the longer a rule is under review at OIRA, the more the office distorts it and changes the cost-benefit calculus. Although there are anecdotal examples of OIRA altering certain rules, there are few studies providing a comprehensive overview of the change in costs and benefits during the life of a rulemaking.

The American Action Forum reviewed 160 final rules published in 2012 and 2013 to determine how costs change between proposed and final rule status. A plurality of rules had increased costs: 74 of the 160 rules studied (46 percent) had higher costs in the final stage than when originally proposed; 46 rules (28 percent) had lower costs; and 40 had no change (25 percent).

In a testament to OIRA's role, financial regulations, primarily from independent agencies, had the wildest swings, with costs increasing by more than 1,691 percent from proposed to final rule. Environmental rules, typically under OIRA review, increased by 41.3 percent, far below the average of the sample (401 percent increase).

OIRA is often specifically criticized for reviews that extend beyond the limit of 90 days. But rules subjected to a final review longer than 90 days actually experienced an average percent change *below* the overall average for costs. Critics may have other reasons to chastise OIRA for lengthy rule reviews, such as contending that delays expose the public to needless risk, but there is no statistical evidence that OIRA is unduly distorting the cost-benefit calculus of rules by holding them for a longer period.

Likewise, reviewing the 14 major rules issued in FY 2012 that provided both costs and benefits reveals that benefits frequently increase during the rulemaking process. Of the 14 major rules, seven (50 percent) had increases from proposed to final, four (28 percent) had decreases, and three (21 percent) had no change. For costs, three (21 percent) had increases, six decreased (43 percent), and three had no change (21 percent).

<b>Rule</b>	<b>RIN</b>	<b>Proposed Cost (in millions)</b>	<b>Final Cost (in millions)</b>	<b>Net Change</b>	<b>Percent Change</b>
Administrative Simplification: Standards	0938-AQ11	N/A	\$3	N/A	N/A
Administrative Simplification: Health Plan	0938-AQ13	\$532	\$532	\$0	0%
Adoption of Operating Rules for EFTs	0938-ARO1	N/A	\$262	N/A	N/A
Hazard Communication	1218-AC20	\$79	\$193	\$113	143%
Standards for Organisms in Ships' Ballast	1625-AA32	\$134	\$74	-\$60	-45%
Standards for Fluorescent Lamp Ballasts	1904-AB50	\$357	\$407	\$50	14%
Standards for Residential Clothes Washers	1904-AB90	\$173	\$173	\$0	0%

Standards of Performance for Petroleum Refineries	2060-AN72	\$83	\$69	\$-13	-16%
MATS (Utility MACT)	2060-AP52	\$9,310	\$8,200	\$-1,110	-12%
Oil and Natural Gas Sector: NSPS	2060-AP76	\$647	\$162	\$-485	-75%
CAFE for 2017 and Later Model Year Vehicles	2060-AQ54	\$8,665	\$8,828	\$163	2%
National Registry: Medical Examiners	2126-AA97	\$516	\$282	\$-234	-45%
Hours of Service of Drivers	2126-AB26	\$401	\$393	\$-8	-2%
Positive Train Control Systems (RRR)	2130-AC27	\$21	\$21	\$0	0%

This data does not reveal exactly why rules change or what specifically OIRA does to amend the cost-benefit calculus. In all levels of government, transparency is paramount, and any information OIRA can provide to explain these changes during the life of a rulemaking would certainly be welcome.

#### **IV. Conclusion**

No one doubts that federal regulation provides benefits to consumers, workers, and the environment. Taxes also provide benefits. However, both taxes and regulations should be transparent, accountable, and subject to rational limitations. Raising taxes obviously involves extensive media coverage but the billions of dollars in new regulatory costs each year is far less visible. Like our tax burden, regulatory burdens should be transparent and all agencies should take the necessary procedural steps to justify significant new requirements.