

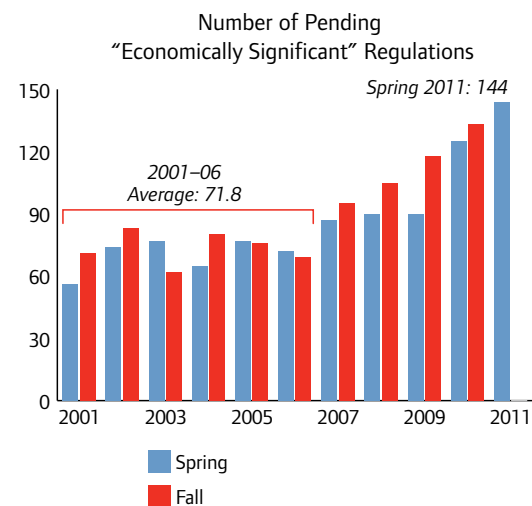
SMARTER REGULATION



Fast Facts

- ▶ The number of major rules is increasing. According to the George Washington University Center for Regulatory Studies, an average of 84 major regulations per year were issued in the last two years, compared to 62 per year during the Bush Administration and 56 per year during the Clinton Administration.¹
- ▶ An October 2011 Gallup poll of U.S. small business owners found that complying with government regulations is the most important problem facing small businesses today (22 percent) — more than either low consumer confidence (15 percent) or lack of consumer demand (12 percent).²
- ▶ The Office of Management and Budget (OMB) conservatively estimates the aggregate cost of 105 regulations issued by federal agencies in the past decade to be between \$44 and \$62 billion per year.³ OMB also estimates that “the total costs and benefits of all Federal rules now in effect (major and non-major, including those adopted more than 10 years ago) could easily be a factor of 10 or more larger than the sum of the costs and benefits reported.”⁴
- ▶ According to Massachusetts Institute of Technology economist Michael Greenstone, a former chief economist of the President’s Council of Economic Advisers, the total costs of regulation can be measured in the hundreds of billions of dollars per year.⁵
- ▶ The Small Business Administration pegs the total cost of all regulations at \$1.75 trillion per year, equal to 12 percent of U.S. GDP in 2008.⁶
- ▶ In addition to the cost burden imposed on businesses, federal agencies spent approximately \$47 billion in 2008 administering and enforcing existing regulations.⁷

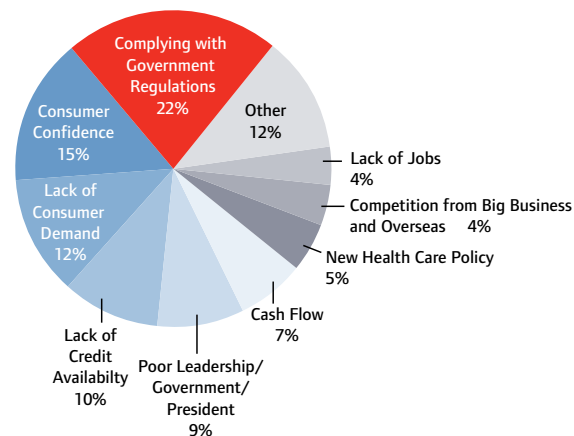
Volume of proposed federal regulation has increased in recent years.



Source: Committee for a Responsible Federal Budget, “The Case for Going Big”

Small business owners cite regulatory burden as a primary concern.

Poll: What is the most important problem facing small-business owners like you today?



Source: Wells Fargo/Gallup Small Business Index, Oct. 3-6, 2011

- ▶ Agencies do not always conduct or adhere to rigorous cost-benefit analysis when crafting regulation. The OMB estimates that in 2010, agencies quantified and monetized both the costs and benefits for only 27 percent of major rules.⁸
- ▶ The permitting process is often delayed due to overlapping agency jurisdiction, inadequate staffing, lack of prioritization and lack of accountability.
- ▶ The federal permitting process for a single energy project can require 35 separate federal permits — as was the case with Shell’s Alaska exploration program.⁹
- ▶ Issuing a permit for the \$2.5 billion Cape Wind renewable energy project off the shore of Massachusetts took 10 years.¹⁰
- ▶ Shell waited five years to obtain an air emissions permit for offshore operations near the coast of Alaska, idling thousands of U.S. jobs and more than \$2 billion worth of drilling leases.¹¹
- ▶ Obtaining the permits needed to build a mine in the United States takes an average of seven years — one of the longest wait times in the world.¹²

A nation’s regulatory system is one of the most telling indicators of its business environment. On the one hand, smart regulations that clarify the “rules of the road” and are in line with broad societal values over multiple election cycles can provide an environment of stability, inspire business confidence and accelerate investment. On the other hand, regulations that create uncertainty and reflect shortsighted political interests can impose unproductive cost burdens on businesses and consumers, undermine confidence, and delay investment. The key distinction, therefore, is not the quantity of regulations but the effectiveness and efficiency of regulations as well as the balance between their costs and intended benefits.

In recent years, the overall regulatory burden on U.S. businesses has grown substantially. Some experts estimate that regulations cost the U.S. economy hundreds of billions of dollars each year. As a result, there are good reasons to believe that excessive regulation is hampering economic growth and recovery in the job market. An October 2011 Gallup poll of U.S. small business owners found that complying with government regulation is the most important problem facing small businesses today — more than either low consumer confidence or lack of consumer demand.¹³

Several aspects of the rulemaking and regulatory process contribute to this negative impact on business activity and resulting drag on economic growth. A relatively small share of proposed regulations is adequately vetted to ensure that projected benefits justify costs. For those cases in which cost-benefit analysis is conducted, costs and benefits are often valued by multiple agencies working in isolation from each other using poor data and/or inadequate methodologies. In some cases, consideration of the economic impact of a regulation is explicitly forbidden, advancing some rules for which costs outweigh benefits.

“Regulations are beneficial only when they’re clear, consistent and wise. And, in large part, the U.S. regulatory regime is so complex and inconsistent that regulations hinder American manufacturers without helping anyone in particular.”

— Andrew Liveris, Chairman, President and CEO, The Dow Chemical Company; Vice Chair, Business Roundtable; and Chair, Business Roundtable Select Committee on Regulatory Reform

transparency and significantly reduce uncertainty for businesses and investors. Finally, streamlining and simplifying the permitting process would substantially lower the anticipated and unanticipated costs of conducting and expanding operations in the United States, increasing capital investments, creating and preserving jobs, and augmenting the competitiveness of the U.S. economy as a whole.

The complex permitting system established by multiple and overlapping regulations imposes a time-consuming and highly unpredictable constraint on businesses seeking to expand operations or productively deploy capital. Delays in permit processing cost businesses and the government billions of dollars each year. Regulations may open the door to excessive litigation and preliminary injunctions, which stall key projects regardless of merit and drastically increase costs to businesses.

Policymakers can take a variety of actions to ensure that the nation’s regulatory system creates an environment that welcomes new investment, economic growth and job creation. Thorough cost-benefit analyses of proposed major regulations using sound scientific and analytical methodologies would ensure that costs are not overly burdensome on the business community or a damper on overall economic activity. Importantly, such analyses should also account for the deterrent effect that costly regulations have on domestic investment. Requiring agencies to disclose their cost estimates for new rules early in the process would increase

Solutions

- ▶ **Objectively analyze the costs and benefits of proposed and final major rules** from all agencies, including “independent” regulatory commissions.
- ▶ To ensure objective analysis of costs and benefits, **follow established methodologies** for selecting studies and models, weighing evidence, performing risk assessments, and conducting peer reviews.
- ▶ **Publicly disclose the estimated costs** of planned regulatory actions early in the regulatory process and with greater specificity.
- ▶ **Streamline the permitting process** for siting and operating a new facility/project and:
 - Require agencies to process permits within defined time;
 - Designate a single agency with primary permitting responsibilities for each project; and
 - Establish a Transparency Portal for tracking government permits.
- ▶ **Consider changes to the Administrative Procedure Act**, particularly relating to the content of the rulemaking record and greater judicial scrutiny of that record.
- ▶ **Withdraw or modify each of the eight major proposed or pending regulations listed below** that were identified by BRT CEOs as posing the greatest threat to business investment, job creation and economic growth.

Proposed or Pending Regulations that Threaten Investment, Jobs and Growth

BRT members rank the regulatory climate as one of their most pressing concerns. The sheer number of regulatory initiatives, their potential cost and the uncertainty they create continue to weigh on investment decisions. These concerns have delayed investment and have contributed to subpar job creation over the past several years.

BRT members have identified more than 60 different pending or anticipated regulations of concern. A full listing of these regulations can be found on the BRT website, www.brt.org.

In reviewing the Administration's regulatory agenda, assessing the potential economic costs of these anticipated regulations and discussing the regulatory landscape with BRT CEOs, three broad categories of regulations emerge as the greatest concerns: environment, including upcoming greenhouse gas (GHG) regulations, the suite of proposed and anticipated regulations affecting hydraulic fracturing, and revisions to the particulate matter (PM) standards; implementation of the Patient Protection and Affordable Care Act, including imposition of new health care taxes and the definition of full-time and part-time employees; and implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act, including implementation of the Volcker Rule, regulation of derivatives and conflict minerals disclosure. Taken together, these proposed or anticipated regulations will affect virtually every company operating in the United States and are likely to impose many billions of dollars of new annual regulatory costs on the U.S. economy.

Environmental Regulations

- ▶ **GHG Regulations** — The Environmental Protection Agency (EPA) announced in December 2010 that it would propose Clean Air Act GHG New Source Performance Standards for electric generating units and petroleum refineries in 2011. The proposed rule for electric generating units currently is pending for review at OMB and is expected to be released within the next several months. It is not clear whether the EPA will propose a single electric generating unit performance standard, e.g., a standard equivalent to the emissions profile of a combined cycle gas turbine, or whether the standard will recognize various fuel types, i.e., coal, natural gas and possible subcategorization to recognize various coal types. Work practices are explicitly authorized by Section 111 (h) of the Clean Air Act if it is not feasible to propose a standard of performance.

While the EPA's GHG standards initially will be applicable only to the electric and petroleum refining sectors of the U.S. economy, they will establish a precedent that may become applicable to other major manufacturing facilities at a later time. The Clean Air Act was not designed to regulate ubiquitous pollutants such as carbon dioxide. The EPA should exercise its authority to set standards relying on work practices to ensure that market distortions do not occur.

- ▶ **Hydraulic Fracturing** — Multiple federal agencies are considering regulating hydraulic fracturing. The EPA has proposed a suite of new regulations for the oil and natural gas industry, including the first federal air standard for wells that are hydraulically fractured. These regulations include a new source performance standard for volatile organic compounds; a new source performance standard for sulfur dioxide; an air toxics standard for oil and natural gas production; and an air toxics standard for natural gas transmission and storage. These regulations are expected to be finalized in April 2012.

In addition, the EPA has announced that it intends to propose a rulemaking on disposal of fracturing water and fluids from shale gas extraction operations in 2014. In a related development, the EPA has announced that it intends to propose a rulemaking on the disposal of wastewater from coal bed methane operations in 2013. The EPA also announced a rulemaking on fracturing fluid chemical reporting under the Toxic Substances Control Act and is in the midst of a long-term study on the impact of hydraulic fracturing on ground water and drinking water. Initial results from the study are anticipated in 2012, and a final report is expected in 2014.

The Department of the Interior has announced it intends to propose regulations in early 2012 for hydraulic fracturing on federal lands it administers, and the U.S. Forest Service has announced a new forest planning rule in the wake of two National Forests taking action against hydraulic fracturing.

Over the past four years, U.S. shale oil and gas production has increased dramatically. This increase has resulted from the application of new technology, including horizontal drilling and hydraulic fracturing, to shale formations that were once thought to be uneconomic to produce, unlocking vast new oil and natural gas reserves. These resources, if they are allowed to be developed, promise to dramatically improve U.S. energy security, reduce the balance of payments deficit and accelerate economic growth, particularly in energy-intensive manufacturing sectors of the U.S. economy.

Federal regulations must be carefully and thoughtfully tailored to ensure that responsible development of shale resources is allowed to continue. The Administration should work with industry proactively to ensure that any regulations reflect industry best practices and do not unduly burden beneficial development of shale resources. In addition, the Administration needs to take into account the pre-eminent role states traditionally play in regulating oil and gas activity within their borders.

- ▶ **PM2.5** — The Clean Air Act requires the EPA to promulgate primary and secondary National Ambient Air Quality Standards (NAAQS) for six air pollutants, including PM. Primary standards have been established for PM10 (course particles) and PM2.5 (fine particles). A required five-year review of the PM NAAQS is in progress, and a proposal to retain or revise those standards is expected this year. Power plants, forest fires, wood-burning fireplaces and stoves, on-road and off-road vehicles, agriculture, and construction activities are major sources of PM. Substantial reductions in PM have occurred and are likely to continue to decline as a result of a number of existing regulations, including the utility Maximum Achievable Control Technology rule, the Cross-State Air Pollution Rule, Regional Haze Regulations and motor fuel desulfurization efforts. Additional measures to further control for PM are likely to be extremely expensive. The EPA should consider the PM emission reduction benefits from rules already promulgated before deciding whether to lower the PM standard even more.

Health Care Taxes and Regulations

In implementing the health care reform law, rules should not require costly changes to the offering of employer-sponsored coverage or impose duplicative and unnecessary requirements, such as government-created paper forms on benefit coverage options. Implementation rules that affect employer-sponsored coverage and the creation of exchanges must address the impact of these rules on the cost, quality and competition in the health care marketplace.

- ▶ **Health Care Taxes** — The health care reform law imposed several taxes on insurance plans, medical devices, pharmaceutical products and employer-sponsored health plans. One such tax is an excise tax on health insurance issuers and sponsors of self-funded group health plans with aggregate expenses that exceed \$10,200 for individual coverage and \$27,500 for family coverage. The amount of the excise tax is 40 percent of an amount considered to be an excess benefit. The health care reform law also added an annual fee on health insurance providers beginning in 2014. The health care reform law imposed a tax on fully insured and self-insured products to finance comparative effectiveness research (Internal Revenue Service [IRS] Notice 2011-35), imposing the tax in 2012 for most policies and plan sponsors. In addition, the Department of Health and Human Services released a proposed rule requiring all insurance plans and plan sponsors to contribute funding to state exchange reinsurance programs. The final rule is pending at OMB.

The health care reform law also imposed an annual fee on certain manufacturers and importers of brand name pharmaceuticals, effective January 1, 2011. The IRS issued Notice 2011-9 in January 2011, which defined the covered entities and fee calculation methodology. The new law also imposed an excise tax of 2.3 percent on the sale of any taxable medical device. The IRS delayed imposition of the tax until 2013. The IRS issued a request for comment regarding this tax in December 2010. These new requirements have a significant impact on the cost of health care coverage. All of these new taxes will be passed through to plan sponsors and their employees. Congress should eliminate unnecessary taxes on medical devices, insurance plans and pharmaceuticals, but unless and until Congress acts, their implementation should be delayed.

- ▶ **Definition of Full-Time and Part-Time Employees** — Starting in 2014, large employers will be assessed a penalty if they fail to provide affordable health insurance, at a minimum value, to any full-time employee who is then found eligible for a tax credit through the exchange. In May, the IRS proposed that a full-time employee be defined as one who has 130 hours of service in a calendar month and that this be treated as the monthly equivalent of at least 30 hours of service per week. Treasury and the IRS are also considering a look-back/stability period safe harbor under which an employer would determine each employee's full-time status by looking back at his or her hours over a defined period of not less than three, but not more than 12, consecutive calendar months, as chosen by the employer. The employee's status determined under this look-back would then persist for a stability period of at least six, but not more than 12, months. Additional rulemakings are expected. The final rule should permit employers to have flexibility in offering employees health insurance coverage.

Financial Regulations

- ▶ **Implementation of the Volcker Rule** — Section 619 of Dodd-Frank (Volcker Rule) aims to limit proprietary trading by banks. It will introduce new complexities and impose higher costs for businesses while slowing down the creation of new markets. The Volcker Rule is likely to reduce market liquidity by limiting the market-making and underwriting activities of market participants, thus increasing market volatility and costs. Foreign regulatory agencies have raised concern about the implications of these regulations, particularly their impact on market participation and liquidity. Regulatory agencies should exercise their discretion to ensure that bank market-making activities are not curtailed as a result of the Volcker Rule. As a first step, regulators should repropose the Volcker Rule, taking into account the legitimate concerns of market participants and heeding the intent of Congress in drafting the underlying statute.

- ▶ **Derivatives Regulation** — While the new regulatory structure for OTC derivatives is not yet completed, concerns are increasing over how the rules could restrict the use of derivatives to manage risks associated with business activities. The proposed new rules will create a burdensome structure that will make it more costly to enter into swaps. They also will create uncertainty in overseas markets. With more cash required to cover the increased costs imposed by regulation (including higher margin requirements), there will be less money for new job creation and growth. Managing and hedging risk is essential for many businesses, particularly with respect to increasingly volatile commodity prices, currencies and interest rates. Yet the proposed regulations do not reflect this reality. Regulators should ensure that derivatives rules provide an unambiguous end-user exemption from clearing, trade execution, margin and capital requirements to allow end users to prudently manage risk. Moreover, interaffiliate derivatives transactions, which pose no risk to the financial system, should not be regulated the same way as market-facing transactions. While it is important that regulators promulgate rules that take into account these concerns, legislative solutions are needed as well to ensure that congressional intent is carried out and to avoid harmful over-regulation.
- ▶ **Conflict Minerals Disclosure** — The Securities and Exchange Commission (SEC) proposed rules in December 2010 to implement Section 1502 of the Dodd-Frank Act, which requires public companies to disclose annually whether their products contain “conflict minerals” (i.e., gold, tin, tantalum and tungsten from the Democratic Republic of the Congo [DRC] or adjoining countries). The SEC’s proposed rules provide for a three-step process that requires companies to (1) determine if conflict minerals are necessary to the functionality of a product they manufacture or “contract to manufacture”; (2) undertake a “reasonable country of origin inquiry” to determine if their conflict minerals originated in the DRC or adjoining countries; and (3) provide an audited Conflict Minerals Report if the conflict minerals in its products, or those it contracts to manufacture, originate in the DRC or adjoining countries or it is unable to determine that they do not. As proposed, the SEC has vastly underestimated the costs of conducting the required due diligence, and achieving compliance is extremely difficult, if not impossible. The SEC should promulgate rules that are cost-effective and workable.

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