



THE REGULATORY TSUNAMI THAT WASN'T

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The Charge

Since the midterm elections, business has been complaining that the Obama administration is pushing a “tsunami” of new regulations. This charge has been repeated by some lawmakers on Capitol Hill as a justification for their efforts to roll back, delay, and even block improved standards and safeguards. It is a theme of the 2012 presidential election, as the two main political parties have very different points of view. But what is the reality? Has the Obama administration adopted more regulations than its predecessors?

This report shows that there is little difference between the Obama administration and past administrations in their overall level of regulatory activity. There has been an increase in the number of significant rules during the Obama administration, but that has been driven by the statutory and judicial deadlines the Obama administration faced and by regulatory actions left uncompleted by prior administrations. The number of pending regulations leading into this election year is remarkably similar to comparable time periods under past administrations and does not provide any evidence of plans for an avalanche of regulations to come.

The Data

OMB Watch set out to determine how the Obama administration's record on regulation compares to those of its predecessors. Our research examined trends in the number of final regulations reviewed by the Office of Information and Regulatory Affairs (OIRA). Under Executive Order 12866, OIRA must approve “significant” regulatory actions¹ – those having an economic impact of \$100 million or more or affecting policy in some novel way – but OIRA's regulation tracking website, reginfo.gov, reports on a broader class of regulatory actions. OMB Watch downloaded XML data reported by OIRA on reginfo.gov and analyzed that information. The numbers we report are OIRA's, not ours, and are current through July 2, 2012.

¹ Executive Order 12866 defines a “Significant regulatory action” as “any regulatory action that is likely to result in a rule that may:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.”

See <http://www.presidency.ucsb.edu/ws/index.php?pid=61560>.

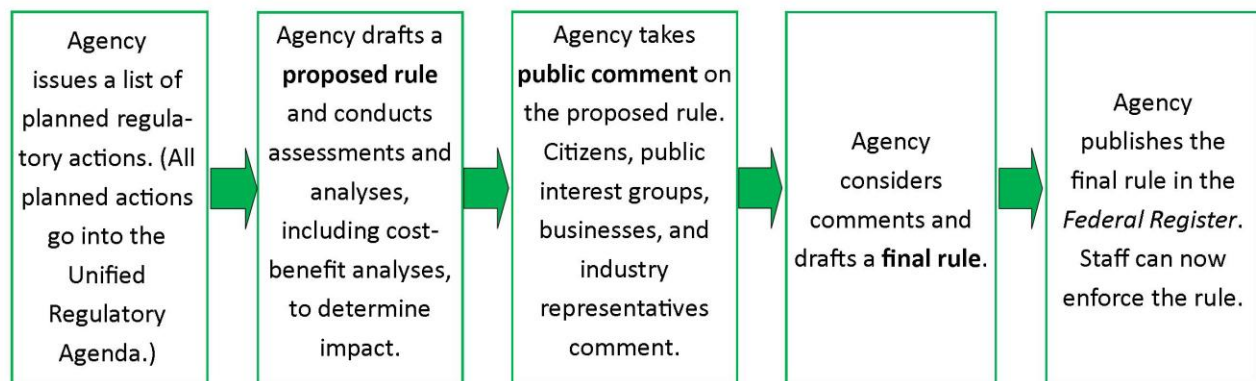
How the Regulatory Process Works

After Congress passes a law, executive agencies begin to develop rules and standards to implement the legislation. The statutes often give executive branch agencies guidance about the content and timing of the regulations that will implement the law. During this period, agencies gather detailed information on the issue, develop ideas on how to regulate, consult with groups that would be affected by the law, draft proposed rules, conduct cost and benefit analyses of those rules, and solicit public comment on them. It can take years before these regulations become final and the impact of the law begins to be felt. For instance, the Government Accountability Office (GAO) has reported that, on average, it now takes the Occupational Safety and Health Administration (OSHA) more than seven years to publish a final worker safety standard.²

The public first learns of planned future regulatory activity when an agency lists a rule in the semi-annual Unified Regulatory Agenda. The regulatory process begins when a notice of proposed rulemaking is published in the *Federal Register*. This notice invites the public, industry, and fellow agencies to comment on the proposed rule and the potential effects it may have. Agencies then take these comments, revise the proposal or respond to the comments they have received, and publish a final rule in the *Federal Register*. A final rule has the same effect as a law and can be enforced with penalties.

Here's the simplest version of the federal rulemaking process.

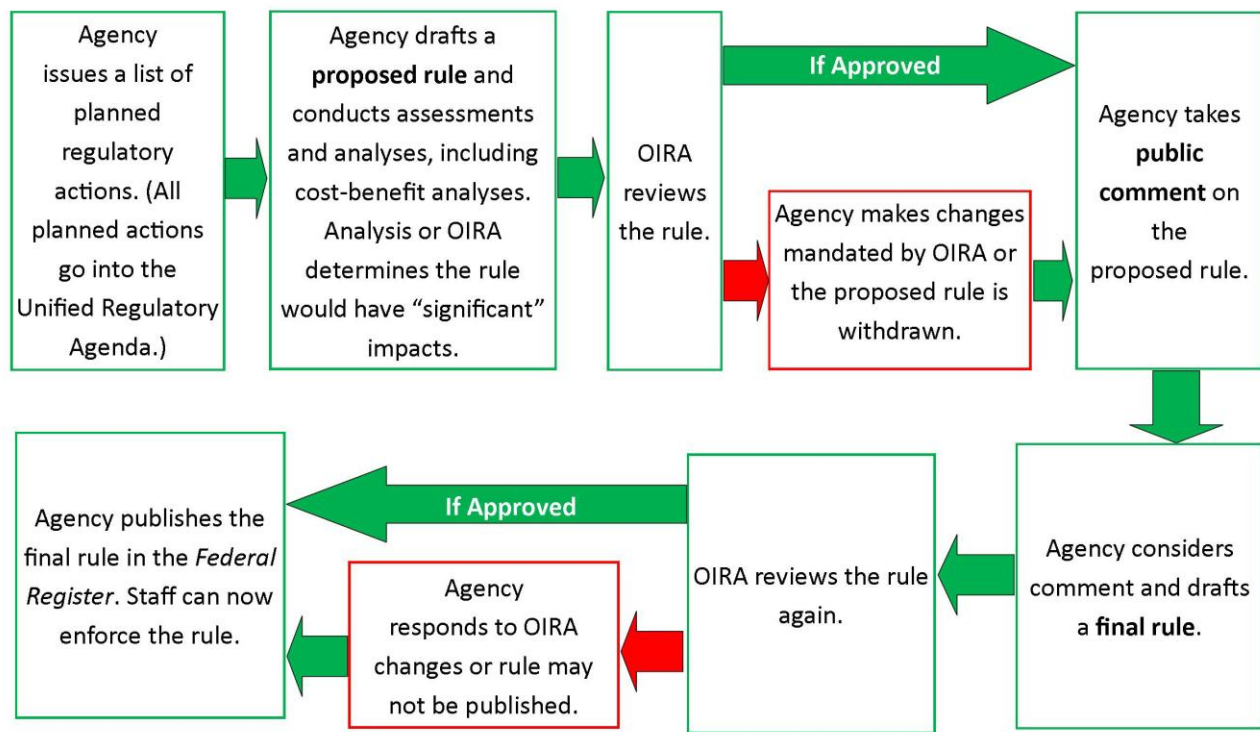
Steps in Federal Rulemaking



² Government Accountability Office, *Multiple Challenges Lengthen OSHA's Standard Setting*, April 2, 2012. <http://www.gao.gov/products/GAO-12-330>.

When OIRA determines a rule is a “significant regulatory action,”³ it must review the rule to determine whether estimates of its benefits justify estimates of its costs. Unless OIRA approves the rule, an agency may not publish it. OIRA reviews both proposed and final rules before they are published. Under Executive Orders 12866 and 13563, OIRA review is not supposed to take more than 90 days, but in practice, reviews can take much longer. When OIRA is involved, the rulemaking process becomes much more complicated, as is demonstrated by the flow chart below.

Steps in Federal Rulemaking for Significant Rules
(Over \$100 Million Annually in Costs or New Policy Issues)



Obama Administration Rulemaking Activity Compared to Previous Administrations

OMB Watch [recently reported](#) both the total number of rules and significant rules reviewed by OIRA under Executive Order 12866 by year and by administration.⁴ In addition, we reported the number of rules withdrawn during or following OIRA review, as well as the number of rules required by judicial and statutory deadlines, by administration.⁵ In this report, OMB Watch provides greater detail on the

³ Executive Order 12866.

⁴ OIRA reports a regulatory action as either economically significant or not. OMB Watch has not independently verified the estimated impact of economically significant rules.

⁵ Agencies designate whether rules are required by statutory or judicial deadline. Our report is based on these agency designations. OMB Watch has not independently verified these designations.

number of rules reviewed by OIRA during the first 42 months of several administrations to ensure strictly comparable time periods.

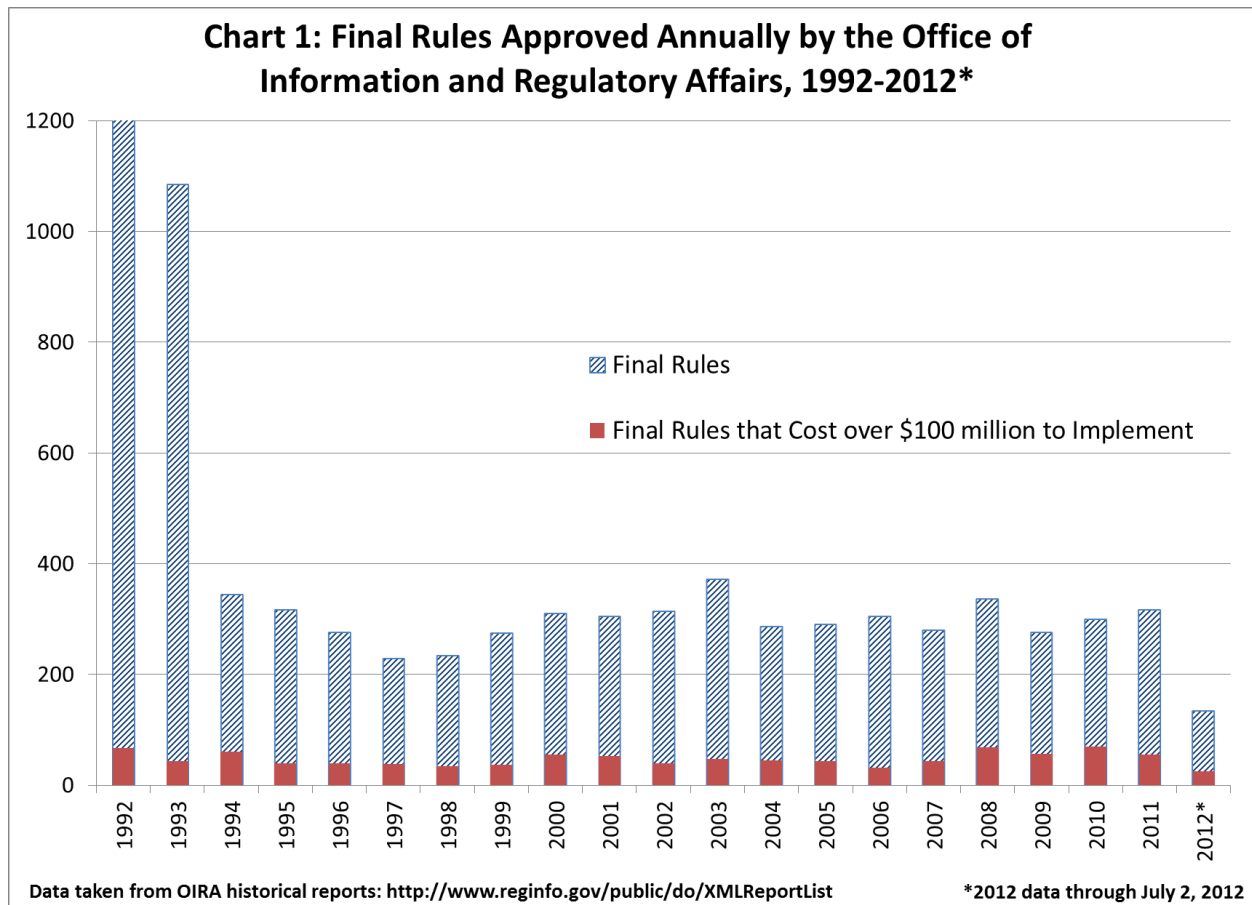
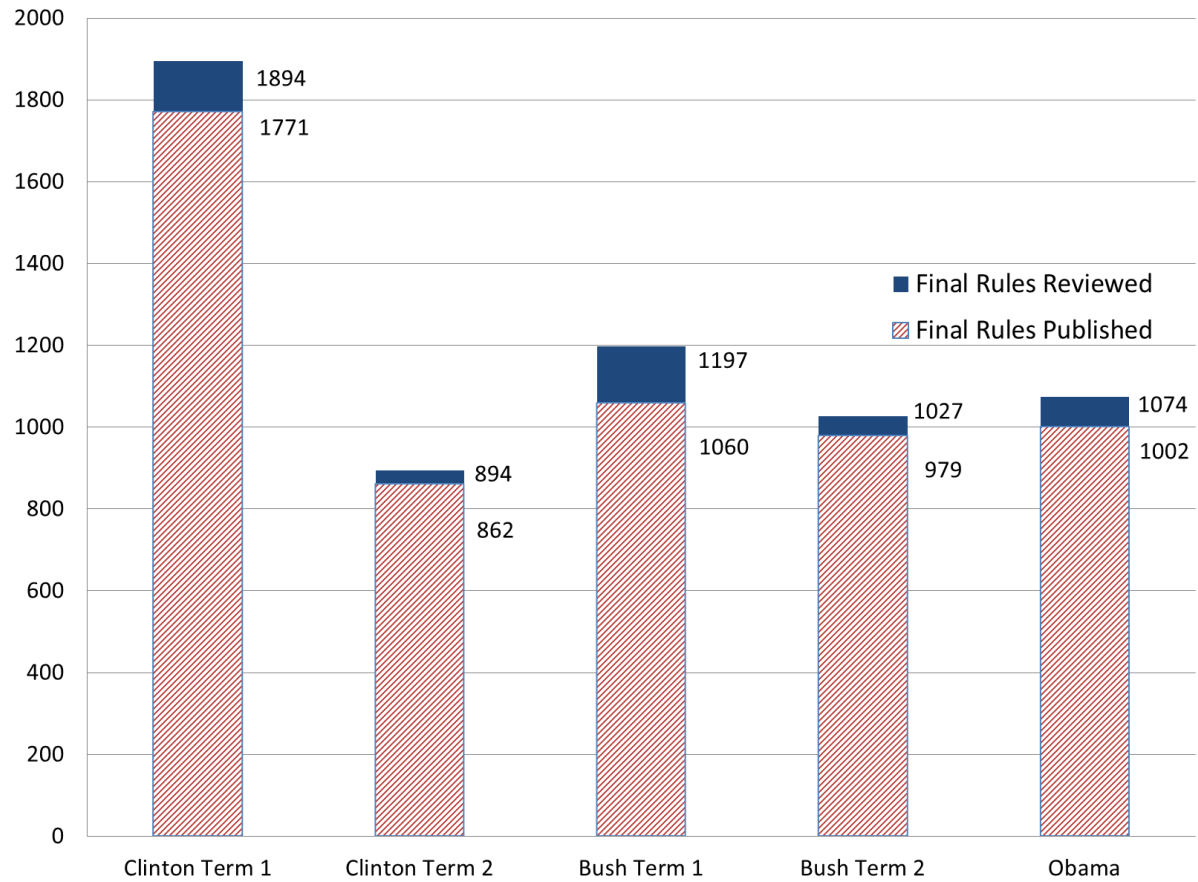


Chart 1 shows the number of final rules, with the number of significant rules highlighted at the bottom of each bar, that were published in the *Federal Register* for each year since 1992.⁶ During the period from 1992-1994, agencies published, and received OIRA approval for, significantly more final rules than has been the case in the years since. Since then, the number of final rules published by agencies annually hovered between 250 and 350. From 2009 until 2011, the first three full years of the Obama administration, OIRA reviewed between 276 and 316 final rules each year – numbers comparable to those of prior administrations.

The number of significant rules that passed review over the past 20 years varied from a low of 32 in 2006 to a high of 70 in 2010, averaging roughly 48 per year since 1992. From 2009 to 2011, the totals ranged from 55 to 70.

⁶ Data reported in Chart 1 was collected up until July 2, 2012. Our presidential term analysis includes all rules reviewed from January 20 of the first year in a presidential term through June 30 in the fourth year. This time period is rounded to 42 months.

Chart 2: All Final Rules Approved by OIRA, by Administration, 1992-2012*



Data taken from OIRA historical reports: <http://www.reginfo.gov/public/do/XMLReportList>

*January year 1 to July year 4

Chart 2 shows the number of final rules submitted for review and published as final in the first 42 months of each of the last five presidential terms. In the first 42 months of the first term of the Clinton administration, OIRA approved 76 percent more total rules than the Obama administration. The first Bush administration approved over five percent more rules in its first 42 months than the Obama administration.

Statutory and Judicial Drivers of Rulemaking Across Administrations

Many statutes require regulatory action within a specified time. In other cases, when agencies fail properly to implement laws as Congress directed, courts will order agencies to complete regulatory action within strict deadlines. Both statutory and judicial deadlines reduce agency discretion on when to regulate. OMB Watch reviewed the data to determine the relative proportion of rules that were required by statutory or judicial deadline and those not so required.

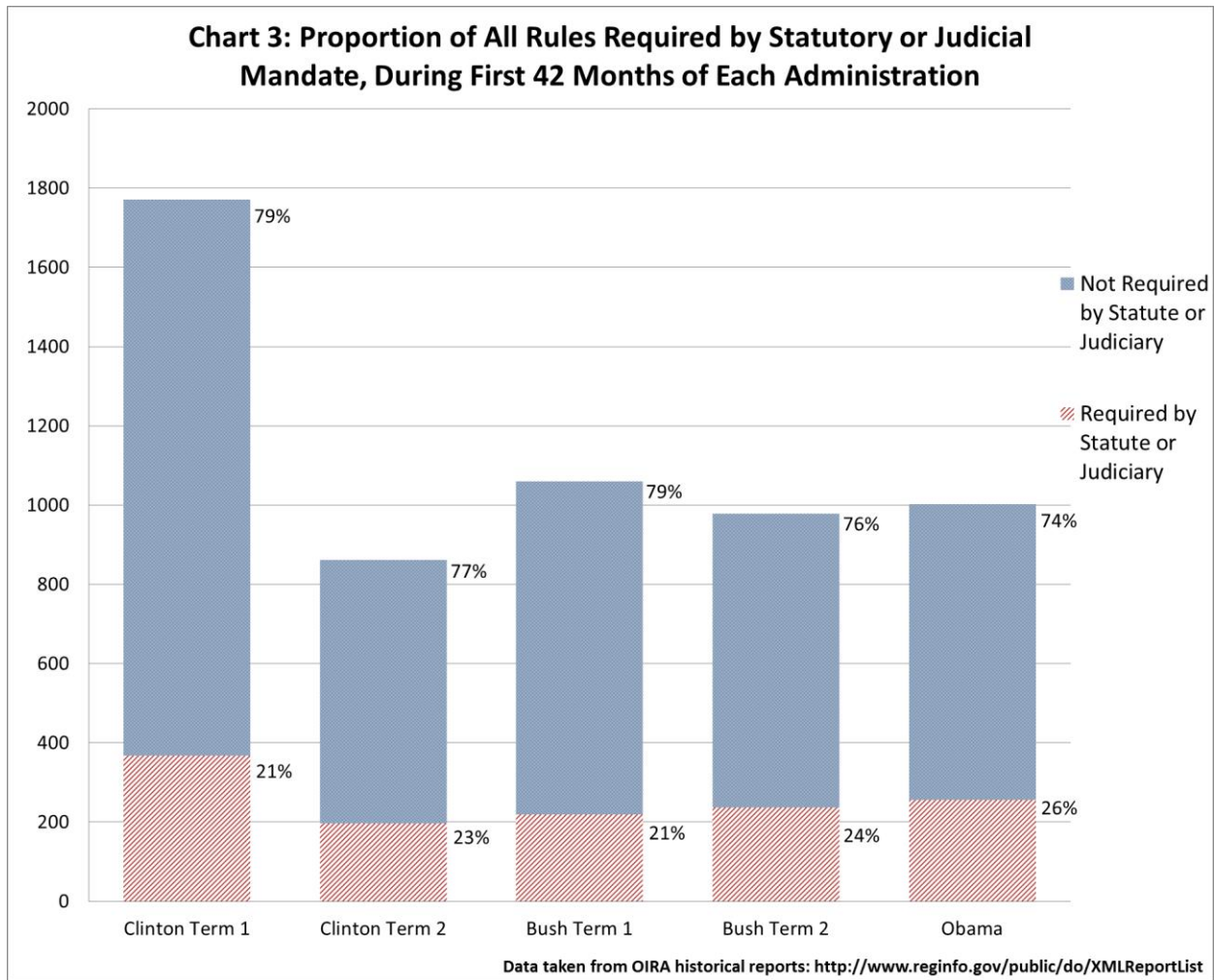


Chart 3 shows that about a quarter of all total final rules were required by statute or judicial decision across the last five presidential terms. In fact, a slightly higher percentage of the total number of rules reviewed by OIRA under the Obama administration was required by statutory or judicial deadline than under the Clinton or Bush administrations.

Examining Economically Significant Rules

Even though the overall number of rules reviewed by OIRA under the Obama administration was quite similar to past administrations, critics argue that the Obama administration has published more economically significant rules than previous administrations.

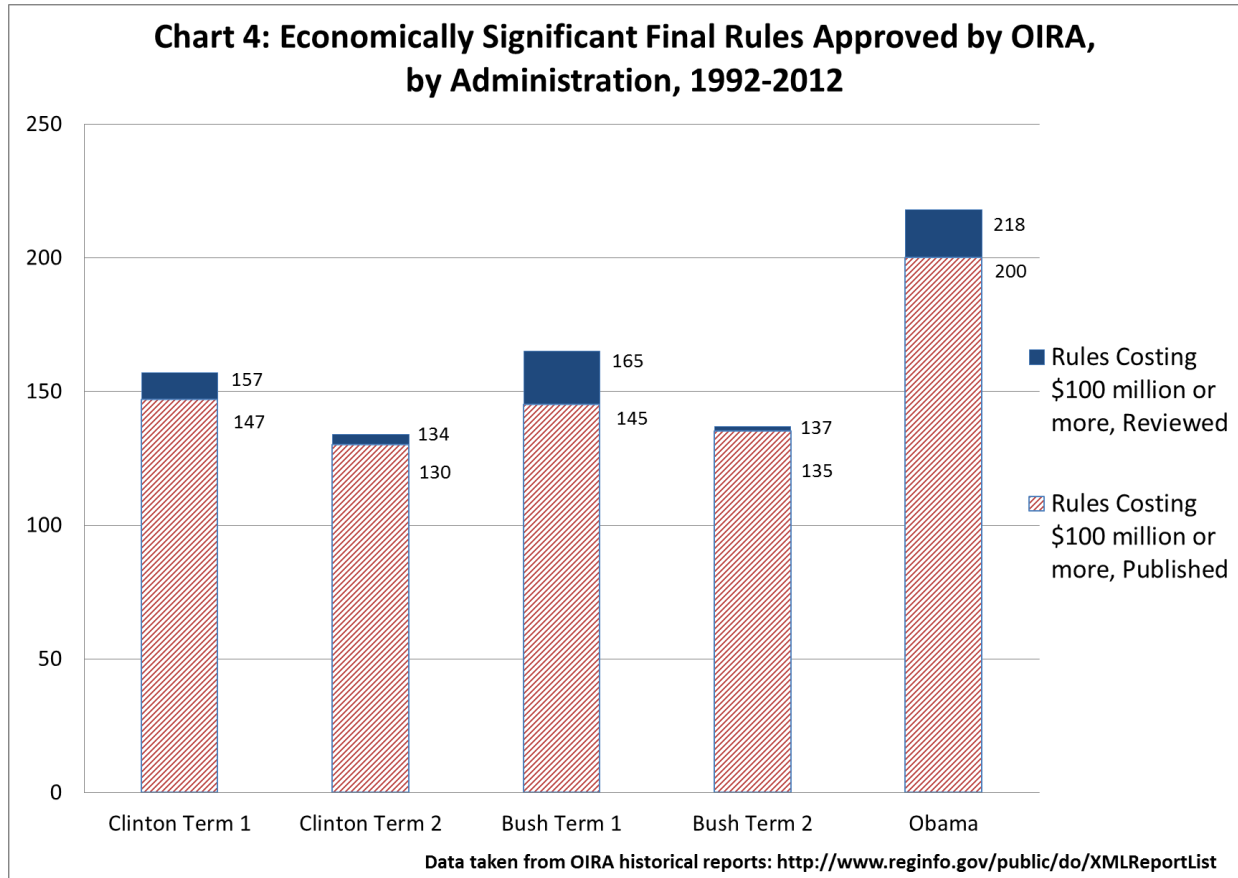
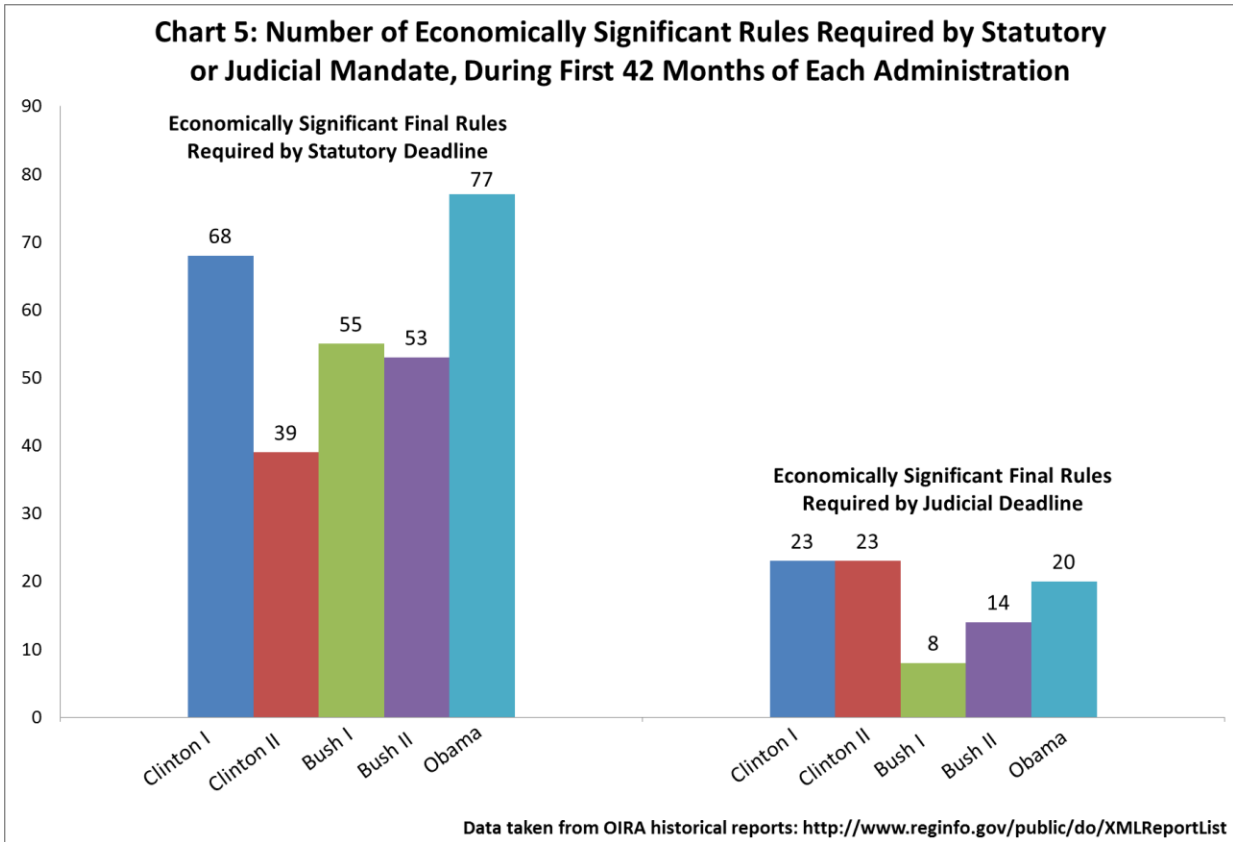


Chart 4 shows the number of rules with total compliance costs estimated at \$100 million or more approved in the first 42 months of the past five presidential terms. The data shows that in the first 42 months of the Obama administration, OIRA approved 55 more (38 percent) economically significant rules than during the same period of President Bush's first term and 53 more (36 percent) than in President Clinton's first term.

While a significant increase, this is hardly a “tsunami.” Some of the increase in significant rules is probably explained by inflation.⁷ Moreover, our analysis shows that a larger number of economically

⁷ The \$100 million threshold was first used in a 1978 executive order from President Jimmy Carter (Executive Order 12044 – Improving Government Regulations. <http://www.presidency.ucsb.edu/ws/index.php?pid=30539>), and it was written into law in 1995 (Unfunded Mandates Reform Act of 1995, P.L. 104-4. <http://www.gpo.gov/fdsys/pkg/PLAW-104publ4/pdf/PLAW-104publ4.pdf>). The \$100 million threshold for significant rules has not been adjusted for inflation since. According to Isaac Shapiro of the Economic Policy Institute, adjusting for inflation, the current threshold should be \$350 million annually. We assume but have not done an analysis to demonstrate that fewer rules would be considered economically significant at the higher threshold.



significant rules were required by statutory and judicial deadlines in the Obama administration than was the case in previous administrations.

Chart 5 shows the number of economically significant rules required by statutory or judicial deadlines over the past five presidential terms. In the first 42 months of the Obama administration, 97 of the 200 economically significant rules published were required by statutory or judicial deadline, compared to 91 of 147 rules in Clinton's first term and 63 of 145 rules in Bush's first term.

Contrary to complaints that the Obama administration has been overzealous in issuing costly new regulations, the Obama administration actually issued only 21 more economically significant rules not required by statutory or judicial deadline than the first Bush administration.

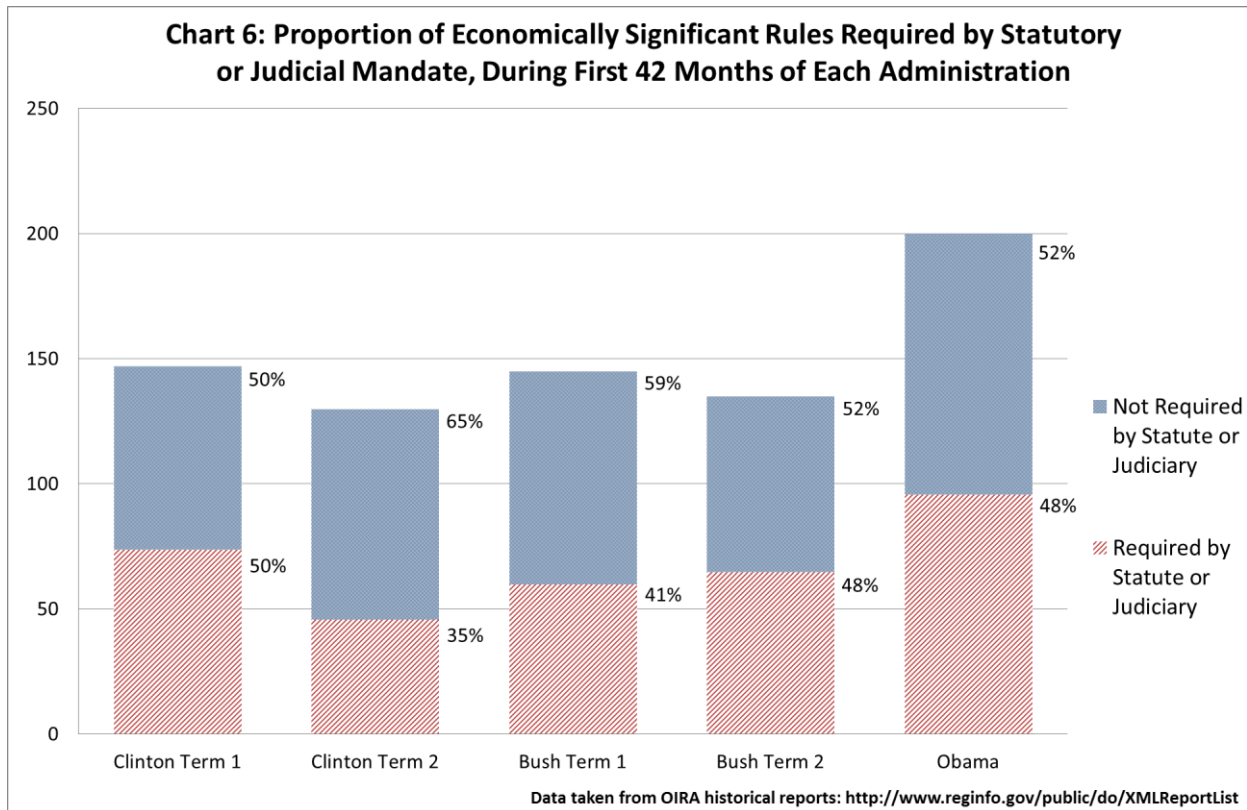


Chart 6 shows the proportion of all the economically significant rules approved in the first 42 months of each presidential term that were required by statutory or judicial deadline. The chart shows that about half the economically significant rules approved by the Obama administration were required by statutory or judicial deadline.

Moreover, because of the length of time it can take to promulgate a significant rule, the Obama administration inherited many of these regulatory initiatives from earlier administrations. For example, one of the most expensive rules issued during the Obama administration is U.S. Environmental Protection Agency (EPA) regulation of greenhouse gases. The Clean Air Act requires the EPA to control emissions that cause or contribute to air pollution that endangers public health or welfare.⁸ The law says if the EPA makes such an “endangerment” finding, it must issue regulations for the pollutants.

EPA was first petitioned to regulate greenhouse gases in 1999; the Bush EPA refused to issue an endangerment finding in 2003. In 2007, EPA’s decision was overruled by the U.S. Supreme Court, and the case was sent back to the D.C. Circuit Court of Appeals, which then set a judicial deadline for EPA to issue an “endangerment” finding, forcing the agency to determine whether greenhouse gases endangered public health. In 2009, the Obama administration found that greenhouse gases endangered public health.

⁸ Section 202(a)(1) of the Clean Air Act specifically states, “The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”

This finding triggered a requirement that EPA issue regulations to protect Americans from these pollutants, and the agency adopted two economically significant rules to do so, both of which were subject to OIRA review. (EPA’s endangerment finding and the rules implementing it were recently upheld by the D.C. Circuit.)⁹ The greenhouse gas rules were 10 years in the making. In this case, one regulatory action by the Bush administration (with no assessed costs) resulted in at least three mandatory regulatory actions by the Obama administration, each of which was counted as economically significant.

Greenhouse gas regulation is not an isolated example of economically significant rules finalized by the Obama administration but initiated during earlier administrations. The Congressional Research Service has noted that several rules promulgated under the Bush administration were vacated or remanded to EPA by the courts, including the agency’s boiler rules and two major rules affecting electric power plants.¹⁰ A *National Journal* article observed that “a stack of court-ordered environmental regulations, some dating back 20 years” were waiting at EPA for the Obama administration.¹¹

So What’s in the Regulatory Pipeline?

Now opponents of regulation are asserting that there are thousands of regulations in the pipeline waiting until after the November election to be issued. According to the National Federation of Independent Business, “over 4,100 regulations [are] pending in Washington that could cost more than a half trillion dollars.”¹²

OMB Watch can find no basis for the claim that there are 4,100 pending regulations. The source cited by the “Small Business for Sensible Regulations” website is data from OIRA.¹³ But OIRA’s list of current regulatory actions – a list which includes regulatory activity that has not yet been initiated, but about which an agency may only be collecting data – contains only 2,676 regulatory actions. The most recent Unified Regulatory Agenda, published in fall 2011, also lists 2,676 regulatory actions as being at some stage of development. The Spring/Summer Unified Agenda has not been released, but if past trends hold, we would expect to see about 75 new rulemaking initiatives added to the Unified Agenda in the spring, a modest increase in activity. Some of these are proposed rules that may be finalized after the election, but many are in the “pre-rule” stage, meaning that no proposed rule has yet been published.

⁹ Andrew Childers, “D.C. Circuit Decision Upholds EPA Greenhouse Gas Regulations in Entirety,” *BNA Daily Environment Report*, June 27, 2012. <http://www.bna.com/dc-circuit-decision-n12884910286/>.

¹⁰ James E. McCarthy and Claudia Copeland, *EPA Regulations: Too Much, Too Little, or On Track?*, Congressional Research Service, Aug. 8, 2012. <http://www.fas.org/sgp/crs/misc/R41561.pdf>.

¹¹ *National Journal*, Sept. 22, 2011.

¹² Small Business for Sensible Regulations. <http://www.sensibleregulations.org/resources/stop-the-tidal-wave-regulations/>.

¹³ Office of Information and Regulatory Affairs. http://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=0000&Image58.x=53&Image58.y=15.

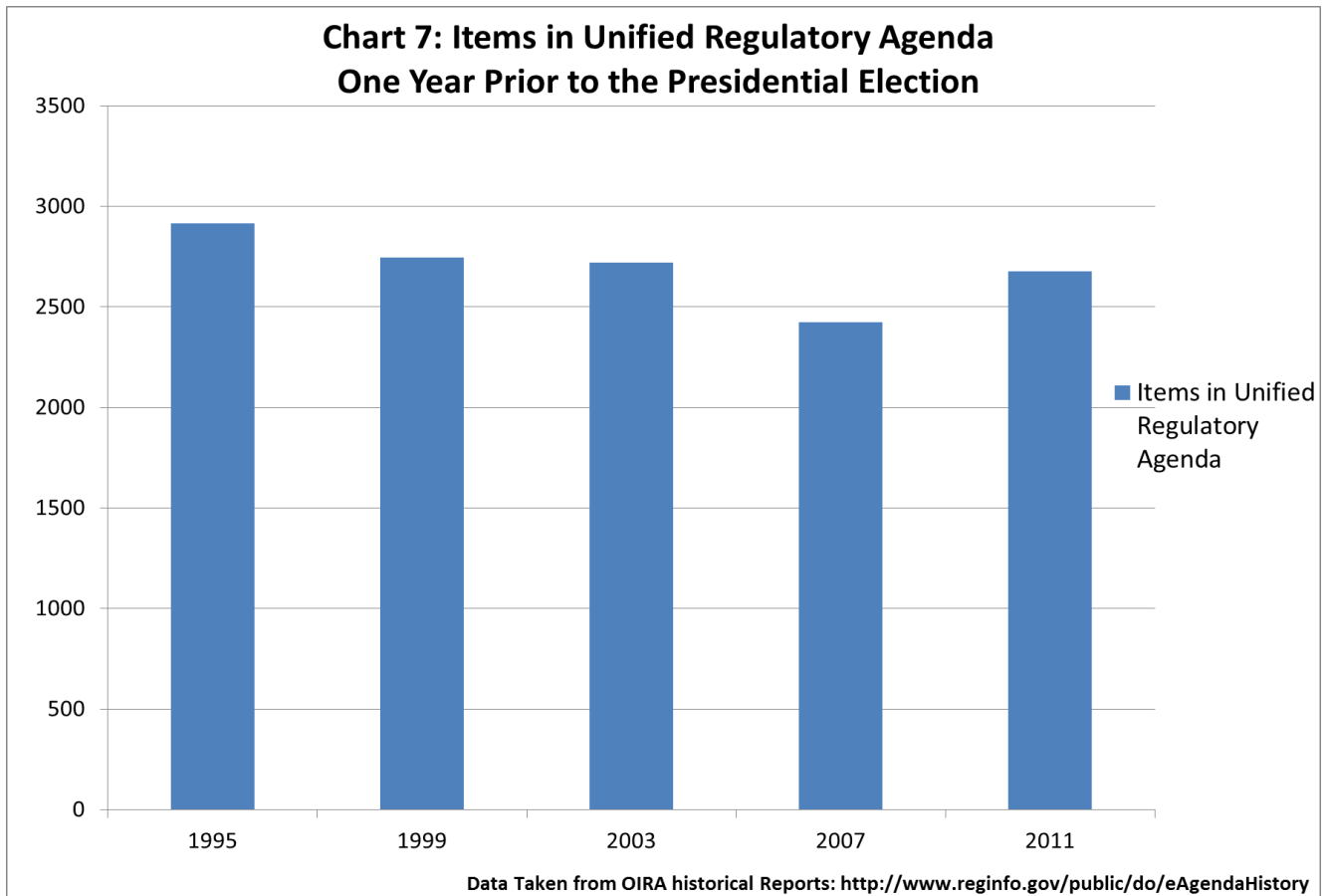


Chart 7 shows the number of regulatory actions listed in the Unified Regulatory Agenda one year prior to the presidential election over the past five presidential terms. The Obama administration looks like past administrations.

Realistically, for an agency to be able to finalize a significant rule in the second term of an administration, the proposed rule needs to already be pending at OIRA at the beginning of the term. Many agencies take between five and seven years to finalize economically significant rules, and some agencies take much longer.

For example, the Occupational Safety and Health Administration (OSHA) has been considering an update of its silica standard for more than a decade. OSHA drafted a proposed silica rule in the Clinton era. Early in the first George W. Bush administration, regulatory impact analyses were completed, and in 2003, OSHA reported to the U.S. Court of Appeals for the 3rd Circuit that silica regulation was such a high priority it could not move forward to protect workers from other hazards. But the proposed rule then languished under the Bush administration.

Obama's OSHA has tried to publish a proposed silica standard, but OIRA has been reviewing the proposal since February 2011, and it is unlikely to be published before 2013. So, a regulatory project first initiated in the Clinton years, which was purportedly a priority during the Bush years, is unlikely to be proposed until after 2013.

Conclusion: A Soft Tide

An objective review of the available evidence tells us that the Obama administration's overall regulatory record is similar to those of his predecessors, despite claims to the contrary by the U.S. Chamber of Commerce and anti-regulatory politicians. The upward drift of the number of economically significant rules can perhaps better be described as a soft tide rather than a "tsunami." The Obama administration has issued more economically significant final rules than in the previous five presidential terms, but many of these rules were required by statutory or judicial deadline. Gathering the information necessary to support regulation, working with affected groups to find the best way to implement new standards, soliciting and reviewing comments, and drafting a final rule is a process that takes years and may span several administrations. Both the Congressional Research Service and the *National Journal* have noted that many of the rules finalized under the Obama administration were initiated, but not completed, under prior administrations.

The charge that the Obama administration has thousands of rules it is waiting to unleash after the election lacks an empirical basis. The Fall 2011 Unified Regulatory Agenda lists 2,676 regulatory actions in some stage of development – a slightly smaller number than were in the works at the end of the first Bush administration. Some portion of these are at the pre-rule stage of development.

As we engage in a national debate about the role that government can and should play in establishing standards that protect us and our quality of life from unnecessary risks, it's important to work from the facts and a full understanding of the rulemaking process.

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