



## Research

# President's Regulatory Record in the Courts

SAM BATKINS | AUGUST 21, 2012

### *Judiciary Strikes Down \$23 Billion in Regulations*

Federal courts have not ignored President Obama's controversial – and costly – rulemakings. Courts have struck down dozens of rules costing \$23 billion. During the past seven years, his regulators have published more than [\\$800 billion](#) in regulatory burdens. Judges across the ideological spectrum – including four Obama appointees – have invalidated Dodd-Frank rules, EPA actions, NLRB labor rules, and FDA rulemakings. The chart below will be updated as courts strike down new regulations.

<u>Case</u>	<u>Issue</u>	<u>Judge</u>	<u>Cost of Regulation</u>
<a href="#">Michigan v. EPA</a>	Mercury Air Toxics Standard	Justice Antonin Scalia	\$10 Billion
<a href="#">NAM v. SEC</a>	Dodd-Frank's Conflict Minerals Rule	Raymond Randolph	\$4.7 billion
<a href="#">API v. SEC</a>	Dodd-Frank's Disclosure by Resource Extraction Issuers	John D. Bates	\$1.4 billion
<a href="#">APA v. Department of Energy</a>	Energy Efficiency Rules for Furnaces	Per Curiam	\$876 million
<a href="#">R.J. Reynolds v. FDA</a>	Cigarette Warning Labels	Richard J. Leon	\$525.5 million
<a href="#">Private Colleges and Universities v. Duncan</a>	Gainful Employment Regulations	Rudolph Contreras (Obama)	\$521.2 million
<a href="#">Delaware v. EPA</a>	Emissions Standards for RICE and SI Engines	A. Raymond Randolph	\$489 million
<a href="#">Ohio v. Army Corps of Engineers et al.</a>	Waters of the U.S.	David McKeague	\$462 million
<a href="#">Chamber of Commerce v. NLRB</a>	Union Notification Posters	David C. Norton	\$386.4 million
<a href="#">Florida Wildlife Federation v. EPA</a>	EPA Imposition of Water Standards for Florida	Robert L. Hinkle (Clinton)	\$206.1 million
<a href="#">OOIDA v. FMCSA</a>	Electronic Monitoring Devices in Trucks	Diane Wood (Clinton)	\$139 million
<a href="#">Loving v. IRS</a>	IRS Tax-Return Preparer Regulations	Brett Kavanaugh	\$142.4 million
<a href="#">APSCU v. Duncan</a>	Department of Education Regulations	Harry T. Edwards (Carter)	\$126.1 million
<a href="#">Home Care Association v. Weil</a>	Labor's Wage Standards for Domestic Employees	Richard J. Leon	\$25.8 million
<a href="#">Business Roundtable v. SEC</a>	Dodd-Frank's Proxy Access Rule	Douglas Ginsburg	\$11.91 million
<a href="#">Bayou Lawn &amp; Landscape v. Solis</a>	Labor Visa Regulation	M. Casey Rodgers	\$14.6 million
<a href="#">Electric Power Supply v. FERC</a>	Demand Response Rule	Janice Rogers Brown	\$1.71

<u>Case</u>	<u>Issue</u>	<u>Judge</u>	<u>Cost of Regulation</u>
<i>Verizon v. FCC</i>	Net Neutrality	David Tatel	\$0.51
<i>UARG v. EPA</i>	GHG Tailoring Rule	Justice Antonin Scalia	N/A
<i>PhRMA v. HHS</i>	Orphan Drugs	Rudolph Contreras (Obama)	N/A
<i>NAM v. NLRB</i>	Union Notification Posters	Amy Berman Jackson (Obama)	N/A
<i>Chamber of Commerce v. NLRB</i>	Ambush Elections Rule	James E. Boasberg (Obama)	N/A
<i>National Mining Association. v. EPA</i>	Water Quality Guidance	Reggie B. Walton	N/A
<i>Luminant Generation Co. v. EPA</i>	EPA Disapproval of Texas Regulations	Jennifer Walker Elrod	N/A
<i>Texas v. EPA</i>	EPA Disapproval of Texas Regulations	E. Grady Jolly	N/A
<i>American Insurance Association v. HUD</i>	Fair Housing Act Rules	Richard J. Leon	N/A
<i>EME Homer City Generation v. EPA</i>	Cross-State Air Pollution Rule	Brett Kavanaugh	N/A
<i>EME Homer City Generation v. EPA</i>	Cross-State Air Pollution Rule	Brett Kavanaugh	N/A
<i>North Dakota v. EPA</i>	Waters of the U.S.	Ralph Erickson	N/A
<i>Wyoming v. Interior</i>	BLM Fracking Rule	Scott Skavdahl (Obama)	\$50 Million
<i>Nevada v. DOL</i>	Overtime Rule	Amos Mazzant (Obama)	\$2.9 Billion
<i>NFIB v. Perez</i>	Persuader Rule	Sam Cummings	1.2 Million
<i>ABC of TX v. Rung</i>	Fair Pay and Safe Workspaces	Marcia C. Crone	\$872 Million
<i>Mingo Logan Coal Co. v. EPA</i>	EPA Rescission of Mine Permit	Amy Berman Jackson (Obama)	N/A
			<b><u>TOTAL: \$23 BILLION</u></b>

In April, a federal judge in Florida invalidated NLRB’s union notification posters. During the comment process, [AAF argued](#) that NLRB’s “Notification of Employee Rights” proposal likely exceeded the Board’s statutory authority. National Labor Relations Board (NLRB)

President Obama’s appointee to the D.C. District Court, Judge Amy Jackson, agreed and invalidated part of the regulation.

More recently, Judge David Norton of the South Carolina District Court concluded that NLRB exceeded its statutory authority, writing, “Since Congress has required notice posting in at least nine other federal labor statutes, notice posting is clearly a major question, not an interstitial matter.... The court holds that the Board lacks authority to promulgate the notice-posting rule based on its discovery of a ‘gap’ left in the Act by Congress.”

The U.S. Court of Appeals for D.C. (D.C. Court of Appeals) immediately enjoined NLRB’s enforcement of the regulation. NLRB Chair Mark Gaston Pearce then announced that the Board would refrain from implementation, pending the outcome of further litigation.

## DODD-FRANK

Just one year after passage of Dodd-Frank, the D.C. Court of Appeals held that the Securities and Exchange Commission (SEC) violated the Administrative Procedure Act (APA) by failing to “consider the rule’s effect upon efficiency, competition, and capital formation...” when it finalized its proxy access rule. The now-defunct regulation required companies to include shareholder nominees for director positions. The rule applied regardless of company size, affecting many small businesses.

To date, SEC has imposed more than 4.1 million hours of paperwork compliance during its implementation of Dodd-Frank.

The Court’s invalidation of the proxy access rule should concern the Consumer Financial Protection Bureau, which recently issued a rule on remittance transfers that imposes more than 7.6 million paperwork hours, but contains no benefit-cost analysis.

According to [AAF data](#), incomplete benefit-cost analyses are common. Of the 99 Dodd-Frank rulemakings that impose paperwork burdens, only 57 also quantify costs, and dozens fail to conduct a full benefit-cost analysis.

## EPA

According to the [Government Accountability Office](#) (GAO), EPA has suffered several setbacks in federal court, having lost 184 cases from FY 2003 to FY 2010.

Last March Judge Jennifer Walker Elrod found EPA improperly denied a Texas environmental implementation plan. Judge Elrod concluded that EPA created “three extra-statutory standards ... out of whole cloth.”

In addition, in *Mingo Logan Coal v. EPA*, Judge Amy Berman Jackson found EPA improperly withdrew two Clean Water Act permits. In a 34-page opinion, Judge Jackson wrote, “This attempt to withdraw the specification of discharge sites after a permit has been issued is *unprecedented in the history of the Clean Water Act*.”

Bear in mind the administration’s broader regulation of the energy sector. EPA has imposed greenhouse gas standards and made the cost of regulatory compliance higher by implementing [Boiler MACT](#), [Utility MACT](#), and [Cross State Air Pollution](#) rules.

## FDA’S CIGARETTE LABELS

In June 2011, FDA mandated that all cigarette packaging contain graphic warning labels. Judge Richard J. Leon wrote that Congress and FDA imposed “bold” affronts to the Constitution with new warning labels.

Judge Leon found FDA’s regulation violated the First Amendment. He added, “[T]hese mandatory graphic images unconstitutionally compel speech, and [the plaintiffs] will suffer irreparable harm absent injunctive relief...”

The case is still pending review by a higher court but it appears FDA’s regulation will face a high constitutional

bar in future litigation.

## GAINFUL EMPLOYMENT RULE

On June 30, an Obama appointee struck down the so-called “Gainful Employment” rule, implemented by the Department of Education. In a scathing decision, Judge Rudolph Contreras called the regulation “not based upon any facts at all,” adding that it was “not reasoned decisionmaking,” by Secretary Arne Duncan.

The regulation would have required for-profit institutions to meet certain metrics for graduate loan repayment and earnings. For-profit universities that fail to achieve the definition of “Gainful Employment” lose federal funding. By the same rubric, thousands of recent graduates from public colleges and law schools are similarly situated but their alma maters do not face such market discipline: the rule only applies to for-profit institutions.

A conservative estimate of the rule’s impact predicts a compliance cost of more than 261,000 man-hours and \$338 million in lost revenue for the for-profit sector. One recent government estimate projected that five percent of institutions would lose funding if the courts had not struck down the regulation.

## CONCLUSION

Judicial review of agency actions under President Obama has had a significant impact on both monetized costs and broader public policy. Although a vast regulatory web remains, it is worth noting the challenge this administration has had sustaining its signature domestic achievements in federal court, even with friendly judges. With major EPA rules still under review, courts could add to the President’s legal struggles.

*(Updated 11/25/2016)*