

MIDNIGHT RULES RELIEF ACT OF 2016

SEPTEMBER 21, 2016.—Committed to the Committee of the Whole House on the Senate of the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary,
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 5982]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 5982) to amend chapter 8 of title 5, United States Code, to provide for en bloc consideration in resolutions of disapproval for “midnight rules”, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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Purpose and Summary

H.R. 5982 amends the Congressional Review Act (CRA) to allow joint resolutions disapproving *en bloc* regulations submitted to Congress for review within 60 legislative days of the end of a presidential term. The bill is designed to strengthen Congress' institutional authority over legislative rulemaking and solve effectively and efficiently the problem of "midnight rules"—new regulations issued as presidential Administrations draw to a close.

Background and Need for the Legislation

I. THE MIDNIGHT RULE PHENOMENON AND THE CURRENT MIDNIGHT RULE THREAT

As the Obama administration draws to a close, there is renewed concern about midnight rules. This is justified. Any given Administration has an incentive to issue midnight rules, since these rules can entrench an outgoing Administration's final priorities before it leaves office.

Midnight rules, however, present strong institutional concerns for the voters, Congress and incoming presidential Administrations. First and foremost, midnight rules can be issued to thwart or blunt an electoral mandate issued by the voters, as a defeated Administration or party leaves office. A wave of midnight regulations also can overwhelm Congress' ability to check regulatory overreach through CRA disapproval resolutions, oversight and other means. Under current law, for example, CRA resolutions can disapprove only one regulation at a time, rather than *en bloc* to meet a body of end-of-term regulations. Outgoing Administrations, moreover, may be less sensitive to Congress' oversight and appropriations authority, since they can issue regulations and leave office before Congress can respond comprehensively through these tools. Both Congress and incoming presidential Administrations can be hindered in the disapproval or rescission of midnight rules by the pressing need to devote congressional and executive resources to the passage and implementation of the electoral mandate given to a new Congress and a newly elected President.

The hurry to complete regulatory activity towards the end of an Administration, moreover, often results in lower quality regulations. Agencies are rushed to complete their work and issue new rules in time, Office of Information and Regulatory Affairs (OIRA) review is diminished, and neither agency nor OIRA personnel have sufficiently strong incentives or latitude to conduct searching analyses of whether the rules should or should not be issued or modified, because outgoing Administrations have already made clear that they wish to proceed with the rules.¹ The diminished scrutiny midnight rules receive helps to explain findings that midnight rules tend to have both lower net benefits and lower quality supporting analysis than do other regulations.²

¹See, e.g., Jerry Ellig, *Evaluating the Quality and Use of Regulatory Impact Analysis: The Mercatus Center's Regulatory Report Card, 2008–2013* at 43–44, The Mercatus Center (2016) (available at <http://mercatus.org/sites/default/files/Ellig-Reg-Report-Card-Eval-v1.pdf>); see also Patrick McLaughlin & Jerry Ellig, *Does OIRA Review Improve the Quality of Regulatory Impact Analysis? Evidence from the Final Year of the Bush II Administration*, 63 Admin L. Rev. (Special Edition) 179 (2011).

²*Id.*

The Obama administration has been particularly aggressive in its resort to new regulations, including new major regulations, to accomplish its policy goals. Not surprisingly, midnight rules already issued or remaining to be issued by the Obama administration are numerous and in many instances projected to impose high costs.³ But the problem of midnight rules is not unique to the Obama administration, nor is it unique to either political party. On the contrary, Administrations of both parties have for decades witnessed a spike in regulatory output during the midnight period.⁴

Some administrations have instituted temporary measures to manage midnight rules better. During the George W. Bush administration, for example, White House Chief of Staff Joshua Bolten directed that “[e]xcept in extraordinary circumstances,” all regulations to be finalized by the Administration were to be proposed no later than June 1, 2008, and finally promulgated no later than November 1, 2008.⁵ The effort was not entirely successful, but it was earnest.

The Obama administration also has exhorted agencies to take steps towards better midnight rule management. Specifically, on December 17, 2015, OIRA Administrator Shelanski issued a memorandum to agencies stating that they “should strive to complete their highest priority rulemakings by the summer of 2016 to avoid an end-of-year scramble that has the potential to lower the quality of regulations that OIRA receives for review and to tax the resources available for interagency review.”⁶ As in the Bush administration, however, there was little provision for penalties for agencies that fail to follow that timeline, and the Obama administration measure was more modest than the Bush administration’s in any case.

In the face of tepid Executive Branch discipline and the lack of legislative reform, the potential for midnight rule abuse and misfeasance continues apace. According to the Obama administration’s 2016 Spring Unified Agenda of Regulatory and Deregulatory Actions, released June 1, 2016, there are at least \$5.3 billion in planned costs in just the period from November to December 2016.⁷ These include, for example, a final Renewable Fuels Standard and requirements for Systemically Important Financial Institutions.⁸ And, although Administrator Shelanski pledged to curtail the midnight rush of regulation, the trend through the first half of 2016 revealed the typical surge of end-of-term rules. Compared to similar periods during President Clinton and President Bush’s tenure, the Obama administration has approved 38 percent more economically significant regulation than at any time since 1996, when the

³See, e.g., Sam Batkins, *Administration’s Last Regulatory Pieces to Cost \$113 Billion*, American Action Forum (June 1, 2016) (*Last Regulatory Pieces*) (available at <https://www.americanactionforum.org/insight/administrations-last-regulatory-pieces-cost-113-billion>).

⁴See, e.g., Jerry Brito and Veronique De Rugy, *For Whom the Bell Tolls: The Midnight Regulations Phenomenon*, Mercatus Center, George Mason University (December 2008) (available at <http://mercatus.org/publication/whom-bell-tolls-midnight-regulation-phenomenon>).

⁵Memorandum from Joshua B. Bolten to Heads of Executive Agencies and Agencies and the Administrator of the Office of Information and Regulatory Affairs re: *Issuance of Agency Regulations at the End of the Administration* at 1 (May 9, 2008).

⁶Sam Batkins, *Midnight Regulations: Examining Executive Branch Overreach*, American Action Forum (February 10, 2016) (available at <https://www.americanactionforum.org/testimony/midnight-regulations-examining-executive-branch-overreach>).

⁷See *Last Regulatory Pieces* at 6.

⁸*Id.*

Clinton administration passed through its first midnight rule period.

II. PREVIOUS LEGISLATIVE ATTEMPTS TO ADDRESS THE PROBLEM OF MIDNIGHT RULES

A number of prior initiatives have attempted to address the midnight rule problem. During the 110th and 111th Congresses, for example, Rep. Nadler (D-NY) introduced the “Midnight Rule Act,” (H.R. 7926; H.R. 34). The Midnight Rule Act would have amended civil service law to provide that, subject to certain exceptions, midnight rules adopted within the final 90 days of an Administration not take effect until 90 days after the appointment by the new President of the issuing agency’s new head. The legislation would then have authorized the new agency head to disapprove of a midnight rule within 90 days of his or her appointment.

Another approach has been to propose a regulatory moratorium on rulemaking during the midnight rule period. During the 112th Congress, Rep. Ribble introduced H.R. 4607 pursuing this approach. That bill would have instituted a moratorium on the proposal or issuance of significant rules after Election Day and through Inaugural Day of the following year when a presidential Administration was leaving office, subject to certain exceptions. This same proposal was reintroduced this term through H.R. 4612, sponsored by Rep. Walberg (R-MI).

The Subcommittee on Commercial and Administrative Law held a hearing which included consideration of Rep. Nadler’s Midnight Rule Act during the 111th Congress. The full Committee, however, did not report the bill. The Committee on Oversight and Government Reform reported Rep. Ribble’s and Rep. Walberg’s moratorium-based legislation during both the 112th and 114th Congresses.

III. H.R. 5982’S SOLUTION—*EN BLOC* CRA DISAPPROVAL RESOLUTIONS FOR MIDNIGHT RULES

H.R. 5982 offers a more effective, efficient and flexible solution. Rather than rely on regulatory moratoria or otherwise reconfigure rulemaking procedures, the Midnight Rules Relief Act simply authorizes a Congress that follows the end of a President’s term to disapprove *en bloc* regulations submitted to it under the CRA during the last 60 legislative days of the preceding Congress.

Since its enactment in 1996, the CRA has allowed a succeeding Congress to disapprove regulations submitted during its predecessor Congress’ last 60 legislative days—one-by-one. By reforming this authority to allow *en bloc* disapprovals, H.R. 5982 offers a powerful way for an incoming Congress, in one fell swoop, to dispose of midnight rules that should be rejected. This efficient and effective means of response, moreover, is highly flexible. There is no constraint on the number of rules that can be included in an *en bloc* resolution, other than that the rules must be drawn from those submitted within the last 60 legislative days of the prior Congress. If only a handful of midnight rules are objectionable, only they need be included. If larger numbers are objectionable, all of them can be included. The matter is left to the assessment of the succeeding Congress, in light of what the outgoing Administration submitted, what the voters communicated in the election, and what

regulations can muster support for inclusion in a successful resolution.

The CRA's current provision for rule-by-rule disapprovals provides only a minimal check on the desires of outgoing Administrations to promulgate problematic midnight rules. The Midnight Rules Relief Act would turn that table entirely. Administrations working under the "Sword of Damocles" of a succeeding Congress' disapproval with just one resolution of any or all midnight rules that defied the voters or were otherwise abusive or defective would receive a strong incentive to avoid the promulgation of such rules altogether, and instead focus their resources on the promulgation of rules with the political support and sound design and analysis needed to endure into succeeding Administrations.

This institution of an effective check against problematic midnight rulemaking would, meanwhile, be no more intrusive than the current terms of the CRA. Agencies would not face moratoria or added steps in the rulemaking process during the midnight rule period. Nor would there be a need for any categorical or Presidentially-administered exceptions to the reform. Presidential Administrations would simply labor under the same possibility that two Congresses—the existing one and the succeeding one—would have an opportunity to disapprove a rule submitted during the last 60 legislative days of the existing Congress. All that would change would be the efficiency and effectiveness with which Congress could respond to problematic midnight rules and the strength of the incentive Administrations would have to avoid them.

In short, the Midnight Rules Relief Act is a simple, straightforward, surgical response to the midnight rule phenomena that promises to produce better government, more responsive to the voters, and more faithful to the Framers' design, which lodged legislative authority in the Congress, not the Executive Branch.

Hearings

On July 6, 2016, the Subcommittee on Regulatory Reform, Commercial and Antitrust Law held an oversight hearing on the subject, "Assessing the Obama Years: OIRA and Regulatory Impacts on Jobs, Wages and Economic Recovery." The hearing included oversight of the issue of midnight regulations and the Obama administration's midnight rulemaking period, including Administration measures related to it. Witnesses at the hearing included: the Hon. Howard Shelanski, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget; Douglas Holtz-Eakin, Ph.D., President, American Action Forum and former Director, Congressional Budget Office; Clyde Wayne Crews, Jr., Vice President for Policy, Competitive Enterprise Institute; William Beach, Ph.D., Vice President for Policy Research, Mercatus Center, George Mason University; and, Professor David Driessen, Syracuse University School of Law. H.R. 5982 responds to concerns addressed during the hearing.

Committee Consideration

On September 14, 2016, the Committee met in open session and ordered the bill H.R. 5982 favorably reported, without amendment, by a rollcall vote of 15 to 5, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee's consideration of H.R. 5982.

1. Amendment #1, offered by Mr. Conyers. The Amendment would except from the bill rules that are necessary because of an imminent threat to health or safety or other emergency. Defeated 4 to 13.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)			
Mr. Chabot (OH)			
Mr. Issa (CA)		X	
Mr. Forbes (VA)			
Mr. King (IA)		X	
Mr. Franks (AZ)			
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)			
Mr. Poe (TX)			
Mr. Chaffetz (UT)		X	
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)		X	
Mr. Farenthold (TX)			
Mr. Collins (GA)			
Mr. DeSantis (FL)			
Ms. Walters (CA)		X	
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Mr. Trott (MI)		X	
Mr. Bishop (MI)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)			
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)			
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)			
Ms. Chu (CA)			
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Jeffries (NY)			
Mr. Cicilline (RI)			
Mr. Peters (CA)	X		

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Total	4	13	

2. Amendment #2, offered by Mr. Johnson. The Amendment would except from the bill rules proposed by an agency more than 3 years before the agency submitted the rule to Congress. Defeated 4 to 13.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)			
Mr. Chabot (OH)			
Mr. Issa (CA)		X	
Mr. Forbes (VA)			
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)			
Mr. Chaffetz (UT)		X	
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)			
Mr. Farenthold (TX)			
Mr. Collins (GA)			
Mr. DeSantis (FL)			
Ms. Walters (CA)		X	
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Mr. Trott (MI)			
Mr. Bishop (MI)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)			
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)			
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)			
Ms. Chu (CA)			
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Jeffries (NY)			
Mr. Cicilline (RI)			
Mr. Peters (CA)	X		

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Total	4	13	

3. Motion to report H.R. 5982 favorably to the House of Representatives. Approved 15 to 5.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman	X		
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)			
Mr. Chabot (OH)			
Mr. Issa (CA)	X		
Mr. Forbes (VA)			
Mr. King (IA)	X		
Mr. Franks (AZ)	X		
Mr. Gohmert (TX)	X		
Mr. Jordan (OH)	X		
Mr. Poe (TX)			
Mr. Chaffetz (UT)	X		
Mr. Marino (PA)	X		
Mr. Gowdy (SC)	X		
Mr. Labrador (ID)			
Mr. Farenthold (TX)	X		
Mr. Collins (GA)			
Mr. DeSantis (FL)	X		
Ms. Walters (CA)	X		
Mr. Buck (CO)	X		
Mr. Ratcliffe (TX)	X		
Mr. Trott (MI)			
Mr. Bishop (MI)	X		
Mr. Conyers, Jr. (MI), Ranking Member		X	
Mr. Nadler (NY)			
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)			
Mr. Johnson (GA)		X	
Mr. Pierluisi (PR)			
Ms. Chu (CA)		X	
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)		X	
Mr. Jeffries (NY)			
Mr. Cicilline (RI)			
Mr. Peters (CA)		X	
Total	15	5	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 5982, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 16, 2016.

Hon. BOB GOODLATTE, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 5982, the “Midnight Rules Relief Act of 2016.”

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford, who can be reached at 226–2860

Sincerely,

KEITH HALL,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 5982—Midnight Rules Relief Act of 2016.

As ordered reported by the House Committee on the Judiciary
on September 14, 2016.

H.R. 5982 would amend the Congressional Review Act (CRA) to allow *en bloc* disapproval of multiple regulations issued by a President in their final year in office. Under current law, the Congress can only use the CRA to disapprove one regulation at a time.

Because the bill would affect how the Congress uses the CRA and thus could affect which regulations are allowed to go into effect, it could affect spending subject to appropriation, direct spending, and revenues. For example, regulations can affect the cost of

entitlement programs as well as the collection of fees. Regulatory changes to those programs could either increase or decrease Federal spending or revenues. However, CBO has no basis for estimating how many regulations this legislation might affect or whether this new authority would be used.

Because enacting the legislation could affect direct spending and revenues, pay-as-you-go procedures apply.

CBO cannot determine whether enacting H.R. 5982 would increase net direct spending or on-budget deficits by more than \$5 billion in any of the four consecutive 10-year periods beginning in 2027.

H.R. 5982 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

The CBO staff contact for this estimate is Matthew Pickford. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

Duplication of Federal Programs

No provision of H.R. 5982 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee estimates that H.R. 5982 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. § 551.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 5982 strengthens the institutional authority, efficiency and effectiveness of Congress and diminishes undue burdens on liberty and the U.S. economy by allowing Congress to disapprove in a single, *en bloc* joint resolution any and all abusive or otherwise infirm midnight rules issued by an outgoing presidential Administration.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 5982 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

The following discussion describes H.R. 5982 as reported by the Committee.

Sec. 1. Short Title.

Section 1 sets forth the short title of the bill as the “Midnight Rules Relief Act of 2016.”

Sec. 2: En Bloc Consideration of Resolutions of Disapproval Pertaining to 'Midnight Rules.'

Section 2 amends secs. 801–802 of title 5 to allow disapproval resolutions pertaining to rules submitted to Congress within the last 60 legislative days of a session during the final year of a President's term to disapprove of any number of such rules.

Committee Jurisdiction Letters

PETE SESSIONS, TEXAS
CHAIRMAN

VIRGINIA FOXX, NORTH CAROLINA
TOM COLE, OKLAHOMA
ROB WOODALL, GEORGIA
MICHAEL C. BURGESS, TEXAS
STEVE STIVERS, OHIO
DOUG COLLINS, GEORGIA
BRADLEY BYRNE, ALABAMA
DAN NEWHOUSE, WASHINGTON

HUGH N. HALPERN, STAFF DIRECTOR
(202) 225-9191
www.rules.house.gov



Committee on Rules
U.S. House of Representatives
H-312 The Capitol
Washington, DC 20515-6269

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FRANKING MINORITY MEMBER

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ALCEE L. HASTINGS, FLORIDA
JARED POLIS, COLORADO

DON BISSON, MINORITY STAFF DIRECTOR

Minority Office
H-152, THE CAPITOL
(202) 225-9091

September 19, 2016

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

On September 14, 2016, the Committee on the Judiciary ordered H.R. 5982, the "Midnight Rules Relief Act of 2016", reported to the House. As you know, the Committee on Rules was granted an additional referral upon the bill's introduction pursuant to the Committee's jurisdiction under rule X of the Rules of the House of Representatives over the rules of the House and special orders of business.

Because of your willingness to consult with my committee regarding this matter, I will waive consideration of the bill by the Rules Committee. By agreeing to waive its consideration of the bill, the Rules Committee does not waive its jurisdiction over H.R. 5982. In addition, the Committee reserves its authority to seek conferees on any provisions of the bill that are within its jurisdiction during any House-Senate conference that may be convened on this legislation. I ask your commitment to support any request by the Rules Committee for conferees on H.R. 5982 or related legislation.

I also request that you include our exchange of letters on this matter in the committee report to accompany H.R. 5982 and in the *Congressional Record* during consideration of this legislation on the House floor. Thank you for your attention to these matters.

Sincerely,

Pete Sessions

BOB GOODLATTE, Virginia
CHAIRMAN

F. JAMES SENSENBRENNER, JR., Wisconsin
LAMAR S. SMITH, Texas
STEVE CHARLOT, Ohio
DARRIEL E. BISSA, California
J. RANDY FORBES, Virginia
STEVE KING, Iowa
TRENT FRANKS, Arizona
LOUIE GOHmert, Texas
JIM JORDAN, Ohio
TED POE, Texas
JASON CHAFFETZ, Utah
TONY MARINO, Pennsylvania
TREY GOWDY, South Carolina
PAUL BI. LABRADOR, Idaho
BLAKE FARENTHOLD, Texas
DOUG COLLINS, Georgia
ION DESANTIS, Florida
MIKE WALLACE, California
KEN BUCK, Colorado
JOHN RATCLIFFE, Texas
DAVE TROTT, Michigan
MIKE BISHOP, Michigan

ONE HUNDRED FOURTEENTH CONGRESS

Congress of the United States
House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6216

(202) 225-3951

<http://www.house.gov/judiciary>

September 19, 2016

JOHN CONYERS, JR., Michigan
RANKING MEMBER

JERRILD MADLER, New York
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
STEVE COHEN, Tennessee
HENRY C. "HANK" JOHNSON, JR., Georgia
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SUZAN K. DUBENE, Washington
HAKHEM S. JEFFRIES, New York
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SCOTT PETERS, California

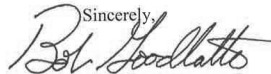
The Honorable Pete Sessions
Chairman
Committee on Rules
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Sessions,

Thank you for your letter regarding H.R. 5982, the "Midnight Rules Relief Act of 2016," which the Judiciary Committee ordered reported favorably to the House on September 14, 2016.

As you noted, the Committee on Rules was granted an additional referral of the bill. I am most appreciative of your decision to forego further consideration of H.R. 5982 so that it may proceed to the House floor. I acknowledge that although you are waiving formal consideration of the bill, the Committee on the Rules is in no way waiving its jurisdiction over the subject matter contained in those provisions of the bill that fall within your Rule X jurisdiction. In addition, if a conference is necessary on this legislation, I will support any request that your committee be represented therein.

Finally, I am pleased to include this letter and your letter in our committee's report as well as the *Congressional Record* during floor consideration of H.R. 5982.

Sincerely,


Bob Goodlatte
Chairman

cc: The Honorable John Conyers, Jr.
The Honorable Louise M. Slaughter
The Honorable Paul Ryan, Speaker
The Honorable Thomas Wickham, Jr., Parliamentarian

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics and existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

* * * * *

PART I—THE AGENCIES GENERALLY

* * * * *

**CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY
RULEMAKING**

* * * * *

§ 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

- (i) a copy of the rule;
- (ii) a concise general statement relating to the rule, including whether it is a major rule; and
- (iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

- (i) a complete copy of the cost-benefit analysis of the rule, if any;
- (ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;
- (iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and
- (iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B).

(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).

(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of—

(A) the later of the date occurring 60 days after the date on which—

(i) the Congress receives the report submitted under paragraph (1); or

(ii) the rule is published in the Federal Register, if so published;

(B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date—

(i) on which either House of Congress votes and fails to override the veto of the President; or

(ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

(C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).

(4) Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress under paragraph (1).

(5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under section 802.

(b)(1) A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.

(2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

(c)(1) Notwithstanding any other provision of this section (except subject to paragraph (3)), a rule that would not take effect by reason of subsection (a)(3) may take effect, if the President makes a determination under paragraph (2) and submits written notice of such determination to the Congress.

(2) Paragraph (1) applies to a determination made by the President by Executive order that the rule should take effect because such rule is—

(A) necessary because of an imminent threat to health or safety or other emergency;

(B) necessary for the enforcement of criminal laws;

(C) necessary for national security; or

(D) issued pursuant to any statute implementing an international trade agreement.

(3) An exercise by the President of the authority under this subsection shall have no effect on the procedures under section 802 or the effect of a joint resolution of disapproval under this section.

(d)(1) In addition to the opportunity for review otherwise provided under this chapter, in the case of any rule for which a report was submitted in accordance with subsection (a)(1)(A) during the period beginning on the date occurring—

(A) in the case of the Senate, 60 session days, or

(B) in the case of the House of Representatives, 60 legislative days,

before the date the Congress adjourns a session of Congress through the date on which the same or succeeding Congress first convenes its next session, section 802 shall apply to such rule in the succeeding session of Congress.

(2)(A) In applying section 802 for purposes of such additional review, a rule described under paragraph (1) shall be treated as though—

(i) such rule were published in the Federal Register (as a rule that shall take effect) on—

(I) in the case of the Senate, the 15th session day, or

(II) in the case of the House of Representatives, the 15th legislative day,

after the succeeding session of Congress first convenes; and

(ii) a report on such rule were submitted to Congress under subsection (a)(1) on such date.

(B) Nothing in this paragraph shall be construed to affect the requirement under subsection (a)(1) that a report shall be submitted to Congress before a rule can take effect.

(3) A rule described under paragraph (1) shall take effect as otherwise provided by law (including other subsections of this section).

(4) *In applying section 802 to rules described under paragraph (1), a joint resolution of disapproval may contain one or more such rules if the report under subsection (a)(1)(A) for each such rule was submitted during the final year of a President's term.*

(e)(1) For purposes of this subsection, section 802 shall also apply to any major rule promulgated between March 1, 1996, and the date of the enactment of this chapter.

(2) In applying section 802 for purposes of Congressional review, a rule described under paragraph (1) shall be treated as though—

(A) such rule were published in the Federal Register on the date of enactment of this chapter; and

(B) a report on such rule were submitted to Congress under subsection (a)(1) on such date.

(3) The effectiveness of a rule described under paragraph (1) shall be as otherwise provided by law, unless the rule is made of no force or effect under section 802.

(f) Any rule that takes effect and later is made of no force or effect by enactment of a joint resolution under section 802 shall be treated as though such rule had never taken effect.

(g) If the Congress does not enact a joint resolution of disapproval under section 802 respecting a rule, no court or agency may infer any intent of the Congress from any action or inaction of the Congress with regard to such rule, related statute, or joint resolution of disapproval.

§ 802. Congressional disapproval procedure

(a) For purposes of this section, the term “joint resolution” means only a joint resolution introduced in the period beginning on the date on which the report referred to in section 801(a)(1)(A) is received by Congress and ending 60 days thereafter (excluding days either House of Congress is adjourned for more than 3 days during a session of Congress), the matter after the resolving clause of which is (*except as otherwise provided in this subsection*) as follows: “That Congress disapproves the rule submitted by the _____ relating to _____, and such rule shall have no force or effect.” (The blank spaces being appropriately filled in). *In the case of a joint resolution under section 801(d)(4), the matter after the resolving clause of such resolution shall be as follows: “That Congress disapproves the following rules: the rule submitted by the _____ relating to _____; and the rule submitted by the _____ relating to _____.* Such rules shall have no force or effect.” (The blank spaces being appropriately filled in and additional clauses describing additional rules to be included as necessary)

(b)(1) A joint resolution described in subsection (a) shall be referred to the committees in each House of Congress with jurisdiction.

(2) For purposes of this section, the term “submission or publication date” means the later of the date on which—

(A) the Congress receives the report submitted under section 801(a)(1); or

(B) the rule is published in the Federal Register, if so published.

(c) In the Senate, if the committee to which is referred a joint resolution described in subsection (a) has not reported such joint resolution (or an identical joint resolution) at the end of 20 calendar days after the submission or publication date defined under subsection (b)(2), such committee may be discharged from further consideration of such joint resolution upon a petition supported in writing by 30 Members of the Senate, and such joint resolution shall be placed on the calendar.

(d)(1) In the Senate, when the committee to which a joint resolution is referred has reported, or when a committee is discharged (under subsection (c)) from further consideration of a joint resolution described in subsection (a), it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) for a motion to proceed to the consideration of the joint resolution, and all points of order against the joint resolution (and against consideration of the joint resolution) are waived. The motion is not subject to amendment, or to a motion to postpone, or to a motion to proceed to the consideration of other business. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of the joint resolution is agreed to, the joint resolution shall remain the unfinished business of the Senate until disposed of.

(2) In the Senate, debate on the joint resolution, and on all debatable motions and appeals in connection therewith, shall be limited to not more than 10 hours, which shall be divided equally between those favoring and those opposing the joint resolution. A motion further to limit debate is in order and not debatable. An amendment to, or a motion to postpone, or a motion to proceed to

the consideration of other business, or a motion to recommit the joint resolution is not in order.

(3) In the Senate, immediately following the conclusion of the debate on a joint resolution described in subsection (a), and a single quorum call at the conclusion of the debate if requested in accordance with the rules of the Senate, the vote on final passage of the joint resolution shall occur.

(4) Appeals from the decisions of the Chair relating to the application of the rules of the Senate to the procedure relating to a joint resolution described in subsection (a) shall be decided without debate.

(e) In the Senate the procedure specified in subsection (c) or (d) shall not apply to the consideration of a joint resolution respecting a rule—

(1) after the expiration of the 60 session days beginning with the applicable submission or publication date, or

(2) if the report under section 801(a)(1)(A) was submitted during the period referred to in section 801(d)(1), after the expiration of the 60 session days beginning on the 15th session day after the succeeding session of Congress first convenes.

(f) If, before the passage by one House of a joint resolution of that House described in subsection (a), that House receives from the other House a joint resolution described in subsection (a), then the following procedures shall apply:

(1) The joint resolution of the other House shall not be referred to a committee.

(2) With respect to a joint resolution described in subsection (a) of the House receiving the joint resolution—

(A) the procedure in that House shall be the same as if no joint resolution had been received from the other House; but

(B) the vote on final passage shall be on the joint resolution of the other House.

(g) This section is enacted by Congress—

(1) as an exercise of the rulemaking power of the Senate and House of Representatives, respectively, and as such it is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of a joint resolution described in subsection (a), and it supersedes other rules only to the extent that it is inconsistent with such rules; and

(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

* * * * *

Dissenting Views

INTRODUCTION

H.R. 5982, the “Midnight Rules Relief Act of 2016,” is a sweeping measure that would enable Congress to disapprove *en masse* potentially every rule submitted under the Congressional Review Act

(CRA)¹ during the final 60 legislative days of a session in the last months of an outgoing presidential Administration. Were this bill currently in effect, every regulation submitted to Congress since May 16, 2016 through the end of this year—including critical, time-sensitive public health and safety regulations—could be invalidated by a subsequent Congress in a joint resolution without allowing Members to consider the merits of individual regulations.

As with the many other anti-regulatory measures that our Committee has considered this Congress, H.R. 5982 is dangerous solution to an undocumented problem. For example, the nonpartisan Administrative Conference of the United States (ACUS) found that “a dispassionate look at midnight rules issued by past Administrations of both political parties reveals that most were under active consideration long before the November election,” while many of these rules involved routine matters or “finishing tasks that were initiated before the Presidential transition period or the result of deadlines outside the agency’s control (such as year-end statutory or court-ordered deadlines).”² The Coalition for Sensible Safeguards (CSS)—an alliance of more than 150 consumer, labor, research, faith, and other public interest groups—similarly concurs, noting that the bill “is based on a fatally flawed premise—namely, that regulations which are proposed or finalized during the so-called ‘midnight’ rulemaking period are rushed and inadequately vetted.”³ In fact, the House has *already passed* legislation to establish a moratorium on midnight rules.⁴

¹ 5 U.S.C. §§ 801–08 (2016).

² ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, ADMINISTRATIVE CONFERENCE RECOMMENDATION 2012–2: MIDNIGHT RULES 1–2 (June 14, 2012), <https://www.acus.gov/sites/default/files/Final-Recommendation-2012-2-Midnight-Rules.pdf>.

³ Letter from the Coalition for Sensible Safeguards to Chairman Bob Goodlatte (R-VA) and Rep. John Conyers, Jr. (D-MI), Ranking Member, Committee on the Judiciary (Sept. 21, 2016) (on file with Democratic staff of the H. Comm. on the Judiciary). Current members of the Coalition include: AFL–CIO; Alliance for Justice; American Association of University Professors; American Federation of State, County and Municipal Employees; American Federation of Teachers; Americans for Financial Reform; American Lung Association; American Rivers; American Values Campaign; American Sustainable Business Council; BlueGreen Alliance; Campaign for Contract Agriculture Reform; Center for Effective Government; Center for Digital Democracy; Center for Food Safety; Center for Foodborne Illness Research & Prevention; Center for Independent Living; Center for Science in the Public Interest; Citizens for Sludge-Free Land; Clean Air Watch; Clean Water Network; Consortium for Citizens with Disabilities; Consumer Federation of America; Consumers Union; CounterCorp; Cumberland Countians for Peace & Justice; Demos; Economic Policy Institute; Edmonds Institute; Environment America; Farmworker Justice; Free Press; Friends of the Earth; Green for All; Health Care for America Now; In the Public Interest; International Brotherhood of Teamsters; International Center for Technology Assessment; International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW); League of Conservation Voters; Los Angeles Alliance for a New Economy; Main Street Alliance; National Association of Consumer Advocates; National Center for Healthy Housing; National Consumers League; National Council for Occupational Safety and Health; National Employment Law Project; National Lawyers Guild, Louisville Chapter; National Women’s Health Network; National Women’s Law Center; Natural Resources Defense Council; Network for Environmental & Economic Responsibility of United Church of Christ; New Jersey Work Environment Council; New York Committee for Occupational Safety and Health; Oregon PeaceWorks; People for the American Way; Protect All Children’s Environment; Public Citizen; Reproductive Health Technologies Project; Safe Tables Our Priority; Sierra Club; Service Employees International Union; Southern Illinois Committee for Occupational Safety and Health; The Arc of the United States; The Partnership for Working Families; Trust for America’s Health; U.S. Chamber Watch; U.S. PIRG; Union of Concerned Scientists; Union Plus; United Food and Commercial Workers Union; United Steelworkers; Waterkeeper Alliance; and Worksafe. Coalition for Sensible Safeguards, *Our Members* (last accessed on Sept. 10, 2016), <http://sensiblesafeguards.org/about-us/members>.

⁴ H.R. 4361, tit. VI, 114th Cong. (2016). As passed by the House on July 7, 2016, this measure included an amended version of H.R. 4612, the “Midnight Rule Relief Act of 2016,” which prohibits certain Federal agencies from proposing or adopting any rule during the presidential transition period (the first Monday in November through January 20 of the following year in which a President is not serving a consecutive term).

Perhaps the most pernicious impact of H.R. 5982 is that should any such rules be invalidated, the agencies that promulgated them would be prohibited under the CRA from ever issuing replacement regulations that are substantially the same, absent congressional action.⁵ The ramifications of this prohibition are immense, given the bill’s potential to invalidate all regulations issued in the last six months of an outgoing presidential Administration.

For these reasons, and those described below, we respectfully dissent and urge our colleagues to reject this legislation when it comes to the House floor.

DESCRIPTION AND BACKGROUND

DESCRIPTION

H.R. 5982 amends section 801(d) of the CRA, which sets forth the process by which Congress may disapprove by joint resolution a rule submitted to it within the last 60 legislative days of the House or Senate session by a Federal agency during the final year of an Administration. Under current law, such joint resolution may only pertain to an individual rule. As amended by the bill, section 801(d) would allow a joint resolution of disapproval for one or more rules without limit that are submitted to Congress within the applicable period.

BACKGROUND

I. OVERVIEW OF FEDERAL RULEMAKING

Rulemaking is the “agency process for formulating, amending or repealing a rule.”⁶ Federal regulations impact nearly every aspect of our lives and are “one of the basic tools of government used to implement public policy.”⁷ The Administrative Procedure Act (APA) establishes the minimum rulemaking and formal adjudication requirements for all administrative agencies.⁸ The APA’s baseline procedural requirements are designed to maintain a balance between agency flexibility and the requirements of due process. In addition to the APA, numerous other procedural and analytical requirements have been imposed on the rulemaking process by Congress and various presidents.⁹ These requirements focus “predominately on agencies’ development of new rules,” according to the Government Accountability Office (GAO).¹⁰

In general, proposed rules go through an extensive vetting process that many believe is already too ossified and cumbersome.¹¹

⁵ 5 U.S.C. § 801(b)(2) (2016).

⁶ 5 U.S.C. § 551(5) (2016).

⁷ CURTIS W. COPELAND, CONG. RESEARCH SERV., RL 32240, THE FEDERAL RULEMAKING PROCESS: AN OVERVIEW 1 (2005).

⁸ 5 U.S.C. §§ 551 *et seq.* (2016).

⁹ Examples of legislative mandates include the Unfunded Mandates Reform Act, Pub. L. No. 104–4 (1995); the Regulatory Flexibility Act, Pub. L. No. 96–354, 94 Stat. 1164, 1169 (1980); and the Congressional Review Act, Pub. L. No. 104–121 (1996). In addition, both Republican and Democratic Presidents have issued executive orders mandating additional procedural and analytical requirements for Federal rulemakings. *See, e.g.*, Exec. Ord. 12,866, 58 Fed. Reg. 190 (Sept. 30, 1993) (outlining requirements for cost-benefit analysis and review by the Office of Information and Regulatory Affairs for significant rules issued by executive branch agencies).

¹⁰ U.S. GOV’T ACCOUNTABILITY OFF., GAO–07–791, REEXAMINING REGULATIONS: OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REVIEWS 1 (2007).

¹¹ *See, e.g.*, Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493 (2012); H.R. 348, the “Responsible And Professionally Invigorating Development Act of 2015” (RAPID Act); H.R. 712, the “Sunshine for Regulatory Decrees and Settlements Act of 2015”; and, H.R. 1155, the “Searching for and Cutting Reg-

The process that most agencies use to promulgate a rule is informal rulemaking, commonly known as notice-and-comment rulemaking, which is set forth in section 553 of the APA.¹² Pursuant to this process, agencies are required to provide the public with adequate notice of a proposed rule and a meaningful opportunity to comment on the rule’s content, which is typically accomplished through publication in the *Federal Register*.¹³ After the comment period closes, the agency must consider the public’s comments and incorporate into the adopted rule a “concise general statement” of the “basis and purpose” of the final rule, from which the public should be able to understand the substance and justification of the rule.¹⁴ The final rule and the general statement must then be published in the *Federal Register* not less than 30 days before the rule’s effective date.¹⁵

The Office of Information and Regulatory Affairs (OIRA) also plays a major role in the rulemaking process. That Office, which is housed in the Office of Management and Budget (OMB), which itself is within the Executive Office of the President, serves as the Federal Government’s “central authority for the review of Executive Branch regulations,” among other responsibilities.¹⁶ OIRA is headed by an Administrator, who is nominated by the President and confirmed by the Senate. Howard Shelanski has served as the Administrator since June 2013.¹⁷

Pursuant to Executive Order 12866, which President Bill Clinton issued in 1993,¹⁸ OIRA must review any “significant regulatory action,” defined as any regulatory action that is likely to result in a rule that may:

- 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;
- create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

ulations that are Unnecessarily Burdensome Act of 2015” (SCRUB Act): Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary, 114th Cong. 1, 4–5 (2015) (statement of Amit Narang, Regulatory Policy Advocate, Public Citizen), http://judiciary.house.gov/_cache/files/cfc2a8c6-729e-4e77-9f9f-561f601c153/narang-testimony.pdf.

¹² 5 U.S.C. § 553 (2016). Agencies may also choose or may be required by statute to use other rulemaking procedures, including formal rulemaking, negotiated rulemaking, and hybrid or expedited approaches, which generally tend to have greater procedural requirements and be subject to stricter judicial review than section 553 notice-and-comment rulemaking. Though rarely used, agencies must sometimes follow the APA’s formal rulemaking procedures “when rules are required by statute to be made on the record after opportunity for an agency hearing.” 5 U.S.C. § 553(c) (2016).

¹³ 5 U.S.C. § 553(b), (c) (2016).

¹⁴ *Id.*

¹⁵ 5 U.S.C. § 553(d) (2016).

¹⁶ Executive Office of the President, Office of Management and Budget, Office of Information and Regulatory Affairs, OIRA, *available at* <https://www.whitehouse.gov/omb/oira> (last visited Sept. 9, 2016).

¹⁷ Executive Office of the President, Office of Management and Budget, Office of Information and Regulatory Affairs, Leadership, *available at* <https://www.whitehouse.gov/omb/oira/leadership> (last visited Sept. 11, 2016).

¹⁸ Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

- raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.¹⁹

In addition, section 2(b) of the Order specifically designated OIRA as “the repository of expertise concerning regulatory issues.”²⁰ In practice, OIRA typically reviews between 500 to 700 rules annually.²¹

II. MIDNIGHT RULEMAKING

The term “midnight rule” refers to a final administrative agency rule promulgated at the end of an outgoing presidential Administration’s term of office. The general concern is that such rule could reflect an effort by an outgoing Administration to bind the incoming Administration. As one analysis explains:

An incoming Administration cannot simply undo a final midnight rule published in the Federal Register if the rule is subject to the Administrative Procedure Act’s notice-and-comment requirements, as is the case with most significant rules. The new Administration can modify or revoke the rule only by initiating a new rule-making procedure—that is, by publishing a new proposed rule in the Federal Register, affording the public an opportunity to submit comments, reviewing the comments, and so forth.²²

Reasons why an outgoing Administration may want to finalize rules during this “midnight” period include the “administration’s desire to set long-term regulatory policy that will survive its departure” or “to await the conclusion of the November elections before issuing controversial rules that may cost its party votes.”²³ Examples of such controversial midnight rules issued by the Clinton administration include energy efficiency standards for washing machines and workplace ergonomics standards. During the waning days of the George W. Bush administration, controversial regulations were issued allowing states to determine whether concealed firearms may be carried in national parks as well as rules giving agencies greater authority to determine whether their actions comport with the Endangered Species Act.²⁴

Potential concerns about midnight rules include whether the analytical review process for such rulemakings may have been rushed, thereby depriving the public or promulgating agency sufficient time to vet the rules with the requisite care.²⁵ For instance, the George W. Bush administration was criticized for allowing insufficient time for public comment, ignoring significant public comments, and otherwise departing from accepted rulemaking prac-

¹⁹ *Id.*

²⁰ *Id.*

²¹ Executive Office of the President, Office of Management and Budget, Office of Information and Regulatory Affairs, *Reginfo.gov—Frequently Asked Questions*, available at <http://www.reginfo.gov/public/jsp/Utilities/faq.jsp> (last visited Sept. 9, 2016).

²² H. COMM. ON THE JUDICIARY MAJORITY STAFF, FINAL REPORT TO CHAIRMAN JOHN CONYERS, JR.: REINING IN THE IMPERIAL PRESIDENCY—LESSONS AND RECOMMENDATIONS RELATING TO THE PRESIDENCY OF GEORGE W. BUSH, at 181 (Mar. 2009) (footnotes omitted).

²³ *Id.* at 180 (footnotes omitted).

²⁴ MAEVE P. CAREY, MIDNIGHT RULEMAKING, CONG. RESEARCH SERV. REP. TO CONG., R42612, at 1 (July 18, 2012).

²⁵ MAEVE P. CAREY, CONG. RESEARCH SERV., MIDNIGHT RULES: CONGRESSIONAL OVERSIGHT AND OPTIONS, CONG. RESEARCH SERV. INSIGHT NO. 10516, at 1 (2016).

tices.²⁶ In addition, some thought that the Bush administration used the midnight regulatory period to promulgate numerous regulations that contravened statutory mandates and the public interest.²⁷ This occurred even though the White House Chief of Staff in May 2008 directed all executive departments and agencies to propose any rules to be “finalized” during the Bush administration “no later than June 1, 2008,” and to issue “any final regulations . . . no later than November 1, 2008,” “except in extraordinary circumstances.”²⁸ The stated purpose of the directive was to follow a “principled approach to regulation as we spring to the finish, and resist the historical tendency of Administrations to increase regulatory activity in their final months.”²⁹ The Bush administration failed to honor this directive. Several significant proposed rules—affecting, among other things, the environment,³⁰ civil rights,³¹ and workplace safety³²—were proposed after June 1, 2008. More importantly, the Bush administration issued numerous final rules on these and other subjects after November 1, 2008. Many of these rules were controversial and were opposed by a majority of the members of Congress and the Obama administration.³³

On December 17, 2015, OIRA Administrator Shelanski issued a memorandum to executive branch agencies recommending that they finalize rules for OIRA review by the summer of 2016 “to avoid an end-of-year scramble that has the potential to lower the quality of regulations that OIRA receives for review and to tax the resources available for interagency review.”³⁴ This memorandum can be viewed as part of the Obama administration’s effort to “curb the use of midnight regulations.”³⁵ In addition, Administrator Shelanski is coordinating with agencies to ensure that “their most important policy priorities move to the front of the line, so that we can really work those through a rigorous process that serves the American public, that serves the parties that are being regulated

²⁶ See, e.g., Letter from Richard L. Revesz, Dean, New York University School of Law & Michael A. Livermore, Executive Director, Institute for the Study of Regulation, to Jim Nussle, Director, Office of Management and Budget (Sept. 5, 2008) (on file with Democratic staff of the H. Comm. on the Judiciary) (charging Bush administration with “engaging in extremely irregular deviations from the traditional rulemaking process . . . including failure to hold public hearings, failure to accept electronic public comments, and shortened public comment periods.”)

²⁷ See, e.g., Reece Rushing, et al., *After Midnight: The Bush Legacy of Deregulation and What Obama Can Do*, CENTER FOR AMERICAN PROGRESS 3–11 (Jan. 22, 2009), <https://www.americanprogress.org/issues/general/report/2009/01/22/5480/after-midnight>.

²⁸ MEMORANDUM FROM JOSHUA B. BOLTON, WHITE HOUSE CHIEF OF STAFF, TO HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES (May 9, 2008), <http://www.nodpa.com/Bolton-memo-regs-5-9-08.pdf>.

²⁹ See Charlie Savage & Robert Pear, *Administration Moves to Avert a Late Rules Rush*, N.Y. TIMES, May 31, 2008, at A–1.

³⁰ Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. 47868 (proposed Aug. 15, 2008).

³¹ Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 50274 (Aug. 26, 2008).

³² Requirements for DOL Agencies’ Assessment of Occupational Health Risks, 73 Fed. Reg. 50908 (proposed Aug. 29, 2008).

³³ See, e.g., Reece Rushing, et al., *After Midnight: The Bush Legacy of Deregulation and What Obama Can Do*, CENTER FOR AMERICAN PROGRESS 3–11 (Jan. 22, 2009), <https://www.americanprogress.org/issues/general/report/2009/01/22/5480/after-midnight>.

³⁴ MEMORANDUM FROM THE HONORABLE HOWARD A. SHELANSKI, ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS (OIRA), TO DEPUTY SECRETARIES OF EXECUTIVE BRANCH AGENCIES (Dec. 17, 2015), https://www.whitehouse.gov/sites/default/files/omb/assets/agencyinformation/circulars/memoranda/2015_pdf/regulatory_review_at_the_end_of_the_administration.pdf.

³⁵ Stuart Shapiro, *Giving ‘Midnight Regulations’ an Earlier Bedtime*, THE HILL (Feb. 11, 2016), <http://thehill.com/blogs/pundits-blog/the-administration/269062-giving-midnight-regulations-an-earlier-bedtime>.

[and] that makes sure that we at OIRA do our job.”³⁶ He also stated that OIRA has moved the “most the most important regulatory priorities up in the line so that they don’t get caught short at the end of the administration.”³⁷

III. CONGRESSIONAL REVIEW ACT

In addition to its ability to check agency behavior through more limited delegations of authority—such as the appropriations process and oversight activity—Congress may also invalidate agency rules under the Congressional Review Act (CRA).³⁸ Enacted with bipartisan support in 1996 as part of the Republican Contract with America,³⁹ the CRA requires an agency promulgating a rule⁴⁰ to submit to the House, the Senate, and the GAO: (1) a copy of the rule; (2) a concise general statement describing the rule (including whether it is a major rule, i.e., one that will likely have an annual effect on the economy of \$100 million or more, increases costs or prices for consumers, industries or state and local governments, or have significant adverse effects on the economy);⁴¹ and (3) the proposed effective date of the rule. If the rule is a major rule, the agency must also submit to GAO and each House of Congress: (1) a complete copy of any cost-benefit analysis; (2) a description of the agency’s actions pursuant to the requirements of the Regulatory Flexibility Act⁴² and the Unfunded Mandates Reform Act of 1995;⁴³ and (3) any other relevant information required under any other act or executive order.⁴⁴

The CRA authorizes Congress to disapprove an agency rule to which it objects by enacting a joint resolution of disapproval.⁴⁵ The joint resolution must be introduced within at least 60 days of the rule’s submission to Congress.⁴⁶ For such resolution to take effect, it must pass both Houses of Congress and be signed by the President thereby satisfying the Constitution’s Bicameralism and Presentment Clauses’ requirements.⁴⁷ Upon enactment, the disapproved rule is deemed not to have been in effect at any time.⁴⁸ Additionally, the CRA prohibits an agency from reissuing a rule that is substantially the same as a disapproved rule.⁴⁹ The CRA prescribes special expedited procedures for Senate consideration of a joint resolution of disapproval, though it does not provide for similar procedures in the House of Representatives.⁵⁰

³⁶ Cheryl Bolen, *To Avoid Midnight Regulations in 2016, Obama Tells Agencies to Set Priorities Now*, BLOOMBERG (Feb. 12, 2015), <http://www.bna.com/avoid-midnight-regulations-n17179923030>.

³⁷ *Id.*

³⁸ 5 U.S.C. §§ 801–08 (2016).

³⁹ Contract with America Advancement Act, Pub. L. No. 104–121, subtitle E, 110 Stat. 857–74 (1996) (codified as 5 U.S.C. §§ 801–808 (2016)).

⁴⁰ As used in the CRA, the term “rule” means “the whole or part of an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy.” 5 U.S.C. § 551 (2016); *see also* 5 U.S.C. § 804(3) (2016) (defining “rule” by reference to § 551, with certain exceptions).

⁴¹ 5 U.S.C. § 804(2) (2016).

⁴² Pub. L. No. 96–353 (1980).

⁴³ Pub. L. No. 104–4 (1995).

⁴⁴ 5 U.S.C. § 801(a)(1)(B) (2016).

⁴⁵ *See* 5 U.S.C. § 802 (2016) (outlining congressional disapproval procedure).

⁴⁶ 5 U.S.C. § 802(a) (2016).

⁴⁷ U.S. Const. Art. I, § 7, cl. 2, 3.

⁴⁸ 5 U.S.C. § 801(f) (2016).

⁴⁹ 5 U.S.C. § 801(b)(2) (2016).

⁵⁰ 5 U.S.C. § 802(c) (2016).

Barring congressional action, a major rule goes into effect on the latest of three possible dates: (1) 60 calendar days after it has been submitted to Congress or has been published in the *Federal Register*, (2) 30 session days after a presidential veto of a joint resolution of disapproval or earlier if either House of Congress votes and fails to override such veto, or (3) the date on which the rule would otherwise have gone into effect absent the CRA review requirement.⁵¹ A nonmajor rule goes into effect as otherwise provided for by law.⁵² In either case, Congress still has 60 legislative or session days to disapprove the rule.

Section 801(d) of the CRA provides a separate process for rules submitted to Congress less than 60 days before the end of the legislative session in the Senate or House.⁵³ While rules submitted before this time period are not subject to additional periods of congressional review, rules submitted on or after the 60th day before a session adjourns *sine die* in either chamber are subject to an additional period of congressional review.

The Congressional Research Service (CRS) estimates that based on the projected second-session schedules of the House and Senate as issued by each chamber's majority leader,⁵⁴ final rules submitted to Congress after May 16, 2016 "will be subject to renewed review periods in 2017 by a new President and a new Congress."⁵⁵ The CRA provides that the renewed 60-day period begins on the 15th legislative day in the House and the 15th session day in the Senate in the next Congress.⁵⁶

CONCERNS

I. H.R. 5982 JEOPARDIZES PUBLIC HEALTH AND SAFETY

As with other anti-regulatory bills considered by our Committee this Congress, H.R. 5982 completely ignores the benefits of regulations, which often exceed their costs by many multiples, and is premised on the misguided belief that regulations undermine employment or economic growth. One of the most problematic aspects of H.R. 5982, however, is that it would permit Congress to invalidate rules *en masse* without proper consideration of an individual rule's benefits and no matter how important or time-sensitive these rules may be.

Agencies often promulgate emergency rules or orders in response to immediate threats to public health and safety. Although the CRA specifically permits agencies to promulgate a rule notwithstanding the APA's notice-and-comment requirements if the agency has good cause, such exception is only available if the agency has not already undertaken regulatory action. It is not difficult to imagine a scenario where, due to exigent circumstances, an agency

⁵¹ 5 U.S.C. § 801(a)(3) (2016).

⁵² 5 U.S.C. § 801(a)(4) (2016).

⁵³ 5 U.S.C. § 801(d)(1) (2016).

⁵⁴ CHRISTOPHER M. DAVIS & RICHARD S. BETH., CONG. RESEARCH SERV., AGENCY FINAL RULES SUBMITTED AFTER MAY 16, 2016, MAY BE SUBJECT TO DISAPPROVAL IN 2017 UNDER THE CONGRESSIONAL REVIEW ACT, IN10437 (2016) [hereinafter CRS CRA Report], available at <http://www.crs.gov/Reports/IN10437?source=search&guid=429f3648ce2c40f09f836a9cb1f29b29&index=9#>.

⁵⁵ *Id.* Of course, if the House or Senate deviates from their stated adjournment date, then the estimated date of May 16, 2016 would change.

⁵⁶ 5 U.S.C. §§ 801(d)(2)(A), 802 (2016).

may need to quickly adopt and implement a rule that has already received public comment, but is still in the rulemaking process.

To illustrate this major shortcoming of H.R. 5982, Ranking Member John Conyers, Jr. (D-MI) offered an amendment that would have exempted from the bill rules issued in response to an imminent threat to health, safety, or other emergencies. For example, long before the Flint Water crisis, the Environmental Protection Agency initiated the process of updating its Lead and Copper Rule, which was originally promulgated in 1991 after years of analysis.⁵⁷

The recent lead-contaminated water crisis that occurred in Flint, Michigan is just the latest in a long history of cases of contaminated municipal water supplies. In fact, the drinking water of potentially *millions* of Americans may be contaminated by lead, which underscores the importance of allowing agencies to swiftly adopt a rule in response to lead in drinking water without being encumbered by this bill’s pernicious delays. Urgent, life-saving rulemakings—such as the EPA’s proposed revisions to its Lead and Copper Rule—must not be impeded or delayed by measures such as H.R. 5982. Unfortunately, this commonsense amendment was not adopted based on a party-line vote of 4 to 13.⁵⁸

II. H.R. 5982 EMPOWERS SPECIAL INTERESTS TO BLOCK CRITICAL, LIFE-SAVING REGULATIONS

Prior to submitting rules to Congress, agencies typically take several years to ensure that they are carefully vetted. Indeed, much of modern rulemaking involves a “very detailed analysis of legal, factual, and policy issues, many of them highly technical. This work is better suited to the subject matter specialists in the respective agencies,” as administrative law expert Professor Ron Levin of Washington University School of Law has previously testified.⁵⁹

Faced with this complexity, H.R. 5982 would result in Congress predictably relying on industry input when presented with an up-or-down vote on a long list of complicated, technical rules. The prospect of industry influence is particularly concerning in light of the potentially unlimited regulatory challenges that the bill would facilitate. As David Goldston of the Natural Resources Defense Council explained with respect to another anti-regulatory measure, special interests would “descend on Congress with even greater fervor than is currently the case to pressure Members to take their side on individual regulations.”⁶⁰

⁵⁷ 40 C.F.R. pt. 141, subpt. 1 (2016).

⁵⁸ Unofficial Tr. of the Markup of H.R. 5982, the “Midnight Rules Relief Act of 2016,” by the H. Comm. on the Judiciary, 114th Cong. 45 (Sept. 14, 2016).

⁵⁹ *H.R. 367, the REINS Act of 2013: Promoting Jobs, Growth, and American Competitiveness: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust L. Of the H. Comm. on the Judiciary*, 113th Cong. (2013) (statement of Ronald M. Levin, William R. Orthwein Distinguished Professor of Law, Washington University School of Law).

⁶⁰ *Regulations from the Executive in Need of Scrutiny Act of 2011: Hearing on H.R. 10 Before the Subcomm. on Courts, Commercial and Admin. L. of the H. Comm. on the Judiciary*, 112th Cong. (2011) (statement of David Goldston, Director of Government Affairs, Natural Resources Defense Council).

III. H.R. 5982 IS BASED ON THE FALSE PREMISE THAT RULES FINALIZED DURING THE LAST YEAR OF A PRESIDENT’S TERM ARE SOMEHOW RUSHED OR IMPROPERLY VETTED

This legislation seeks to address a non-existent problem. Indeed, so-called midnight rules may actually take *longer* to adopt than other rules. For instance, Public Citizen, in its July 2016 report, found that rules finalized during a transition period typically were proposed several years prior to their adoption, short-circuiting the Majority’s stated premise in support of the bill.⁶¹ Focusing on economically significant rules, i.e., rules that have an effect on the economy exceeding \$100 million, Public Citizen found that the average rulemaking duration for rules adopted in transition periods was 3.6 years.⁶² In comparison, rules adopted in non-transition periods took 2.8 years to complete, according to the study. In effect, midnight rules actually take *longer* to adopt than other rules. As the Coalition for Sensible Safeguards—an alliance of more than 150 consumer, labor, research, faith, and other public interest groups—observed in opposition to substantively similar legislation introduced this Congress:

This legislation is based on a fundamentally false premise: that regulations proposed or finalized during the so-called “midnight” rulemaking period—the period following the election and before the inauguration of the new president—are rushed and inadequately vetted. In fact, the very opposite is true. Many of these proposed public health and safety protections have been working their way through the regulatory process for years or decades, and some of them predate the current Administration. Furthermore, many of these regulations were mandated by Congress and have missed rulemaking deadlines set by Congress.⁶³

While there is empirical evidence supporting the notion that outgoing Administrations, at least since the Carter administration, increase the rate at which they issue regulations during the final months of their existence, the nonpartisan, congressionally-established Administrative Conference of the United States (ACUS) studied this phenomenon and found that many of these rules involve “relatively routine matters not implicating new policy initiatives by incumbent administrations,” and that the “majority of the rules appear to be the result of finishing tasks that were initiated before the Presidential transition period or the result of deadlines outside the agency’s control (such as year-end statutory or court-ordered deadlines).”⁶⁴ In fact, incoming Administrations generally do not repeal last-minute rulemakings made by their predecessor Administrations:

⁶¹ Michael Tanglis, *Shining a Light on the “Midnight Rule” Boogeyman*, PUBLIC CITIZEN (July 18, 2016), <http://citizen.org/documents/Midnight-Regs-Myth.pdf>.

⁶² *Id.* at 4.

⁶³ COALITION FOR SENSIBLE SAFEGUARDS, *The Midnight Rule Relief Act: CSS Opposes the Bill and Urges Members of Congress to Vote against It* (last accessed on Sept. 10, 2016), <http://sensiblesafeguards.org/issues/midnight-rule-relief-act>.

⁶⁴ ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, ADMINISTRATIVE CONFERENCE RECOMMENDATION 2012-2: MIDNIGHT RULES 1-2 (June 14, 2012), <https://www.acus.gov/sites/default/files/Final-Recommendation-2012-2-Midnight-Rules.pdf>.

Most final midnight rules survive changes in Administration. One study found that only nine percent of the first Bush administration’s midnight rules were repealed by the Clinton administration, and nearly half went unmodified. The Clinton administration’s midnight rules fared even better. Only three percent were repealed, and more than three-quarters went unmodified. Political pressures, legal constraint, and time and resource limitations have been cited as the main reasons why midnight rules so often survive changes in Administration.⁶⁵

Similarly, the Center for Progressive Reform observes that concerns surrounding midnight rulemaking are overstated and that they are motivated by “ensuring that certain fundamentally antiregulatory components of the rulemaking process—namely, cost-benefit analysis and OIRA review—are afforded every opportunity to achieve the antiregulatory ends that some would desire,” not improving the quality of rules⁶⁶

Lastly, Congress has *already passed* legislation to establish a moratorium on midnight rules.⁶⁷ In its Statement of Administrative Policy threatening to veto that bill, the Obama administration noted that it “would infringe on the powers of the President to faithfully execute the laws in the final months of the term,” while preventing the implementation of laws passed by Congress through beneficial regulations.⁶⁸ Moreover, the Obama administration has stated that it will “avoid an end-of-year scramble” for interagency

⁶⁵ H. COMM. ON THE JUDICIARY MAJORITY STAFF, FINAL REPORT TO CHAIRMAN JOHN CONYERS, JR.: REINING IN THE IMPERIAL PRESIDENCY—LESSONS AND RECOMMENDATIONS RELATING TO THE PRESIDENCY OF GEORGE W. BUSH, at 181 (Mar. 2009) (footnotes omitted).

⁶⁶ As CPR explained:

While “midnight regulations” might make for a good political talking point, there simply is no reason to believe that a rule released at the end of an Administration is worse than those that are released at any other point. In fact, the Administration could have been working on such rules for as long as seven years, which, according to the logic of the midnight regulation alarmists, would suggest that the quality of the rules is even better. After all, if the underlying assumption is that longer rulemakings make for better rules, then many of these last rules could very well be the best of the Administration. . . . But all of this talk about alleged concerns regarding rule quality is actually beside the point. Just take a close look at the arguments that the midnight regulation alarmists raise. You’ll see that their real concern is about ensuring that individual rules are subjected to extensive cost-benefit analysis (purportedly to maximize the rule’s net benefits) and lengthy review by the White House Office of Information and Regulatory Affairs (OIRA). Anti-regulatory advocates assume—and they hope others will, too—that cost-benefit analysis and OIRA review leads to “better” rules, but that is not the case in reality. Instead, these institutions lead inexorably to less protective rules and needless delay. While such results may match the policy preferences of corporate interests and their ideological allies, they are highly inconsistent with public’s interest in seeing that agencies carry out their statutory mission in a timely and effective manner.

James Goodwin, *Midnight Regulations, Shmidnight Shmegulations*, CENTER FOR PROGRESSIVE REFORM (Feb. 12, 2016), <http://sensible safeguards.org/midnight-regulations-shmidnight-shmegulations>.

⁶⁷ H.R. 4361, tit. VI, 114th Cong. (2016). As passed by the House on July 7, 2016, this measure included an amended version of H.R. 4612, the “Midnight Rule Relief Act of 2016,” which prohibits certain Federal agencies from proposing or adopting any rule during the presidential transition period (the first Monday in November through January 20 of the following year in which a President is not serving a consecutive term).

⁶⁸ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 4361, FEDERAL INFORMATION SYSTEMS SAFEGUARD ACT OF 2016 2 (2016), https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr4361r_20160705.pdf.

review,⁶⁹ which has been viewed as part of the Administration’s effort to “curb the use of midnight regulations.”⁷⁰

CONCLUSION

H.R. 5982 is not a modest proposal. The bill dramatically expands the ability of Congress to summarily disapprove rules submitted to it during the last six months or so of an outgoing Administration⁷¹ by authorizing Congress to disapprove *every* rule submitted during this period, regardless of how many years it took to formulate these rules or how critical they may be needed to address imminent public health and safety concerns. The *en bloc* disapproval process authorized by the bill would facilitate wholesale eradication of a prior Administration’s regulatory agenda, without allowing Members to consider the merits of individual regulations. Also of particular concern is the fact that should any such rules be invalidated, the agencies that promulgated them would be prohibited under the CRA from *ever* issuing replacement rules that were substantially the same absent congressional action.⁷²

In addition, H.R. 5982, like many of the anti-regulatory measures offered by the Majority, does not solve an actual problem. While there may be bipartisan concern that so-called “midnight rules” issued during the final days of an Administration warrant additional congressional scrutiny, practice has shown that such concern may be largely unwarranted. As previously noted, ACUS found that although there may be an uptick in the number of agency rules finalized in the waning days of an outgoing Administration, many of these rules involve “relatively routine matters not implicating new policy initiatives by incumbent administrations,” and that the “majority of the rules appear to be the result of finishing tasks that were initiated before the Presidential transition period or the result of deadlines outside the agency’s control (such as year-end statutory or court-ordered deadlines).”⁷³ This finding is likely the result of the fact that most rules already go through the APA’s lengthy notice-and-comment procedures, take years to adopt, and are submitted to Congress nearly a year before a presidential transition period. In fact, last-minute rulemakings generally survive changes in Administration.⁷⁴

For all of the foregoing reasons, we must respectfully oppose H.R. 5982 and we urge our colleagues to join us in opposition.

MR. CONYERS, JR.
MR. NADLER.
MS. LOFGREN.

⁶⁹ Memorandum from the Honorable Howard A. Shelanski, Administrator, Office of Information and Regulatory Affairs (OIRA), to Deputy Secretaries of Executive Branch Agencies (Dec. 17, 2015), https://www.whitehouse.gov/sites/default/files/omb/assets/agencyinformation_circulars_memoranda_2015_pdf/regulatory_review_at_the_end_of_the_administration.pdf.

⁷⁰ Stuart Shapiro, *Giving ‘Midnight Regulations’ an Earlier Bedtime*, THE HILL (Feb. 11, 2016), <http://thehill.com/blogs/pundits-blog/the-administration/269062-giving-midnight-regulations-an-earlier-bedtime>.

⁷¹ As previously noted, CRS estimates that the “midnight rule” period began on May 16, 2016. CRS CRA Report *supra*.

⁷² 5 U.S.C. § 801(b)(2) (2016).

⁷³ ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, ADMINISTRATIVE CONFERENCE RECOMMENDATION 2012-2: MIDNIGHT RULES 1-2 (June 14, 2012), <https://www.acus.gov/sites/default/files/Final-Recommendation-2012-2-Midnight-Rules.pdf>.

⁷⁴ H. COMM. ON THE JUDICIARY MAJORITY STAFF, FINAL REPORT TO CHAIRMAN JOHN CONYERS, JR.: REINING IN THE IMPERIAL PRESIDENCY—LESSONS AND RECOMMENDATIONS RELATING TO THE PRESIDENCY OF GEORGE W. BUSH, at 181 (Mar. 2009) (footnotes omitted).

MS. JACKSON LEE.
MR. COHEN.
MR. JOHNSON, JR.
MS. CHU.
MR. DEUTCH.
MR. GUTIERREZ.
MS. BASS.
MR. RICHMOND.
MR. JEFFRIES.
MR. CICILLINE.
MR. PETERS

