



July 18, 2016

www.citizen.org

Shining a Light on the “Midnight Rule” Boogeyman

An Analysis of Economically Significant Final Rules
Reviewed by OIRA

Acknowledgments

This report was written by Michael Tanglis, Senior Researcher for Public Citizen's Congress Watch division and edited by Congress Watch Research Director Taylor Lincoln.

About Public Citizen

Public Citizen is a national non-profit organization with more than 400,000 members and supporters. We represent consumer interests through lobbying, litigation, administrative advocacy, research, and public education on a broad range of issues including consumer rights in the marketplace, product safety, financial regulation, worker safety, safe and affordable health care, campaign finance reform and government ethics, fair trade, climate change, and corporate and government accountability.



PUBLICCITIZEN

Public Citizen's Congress Watch

215 Pennsylvania Ave. S.E

Washington, D.C. 20003

P: 202-546-4996

F: 202-547-7392

<http://www.citizen.org>

© 2016 Public Citizen.

Introduction and Executive Summary

“The Midnight Rule Relief Act will hold outgoing administrations accountable and ensure President Obama, and any future president, cannot slip through more costly red tape during his final days in office.”

- Rep. Tim Walberg (R-Mich.)¹

Critics of regulations often deride rules that are finalized during the presidential transition period between Election Day and Inauguration Day as “midnight” regulations.² This term is intended to suggest that these rules are rushed, last-second projects.

Some of the most vocal of these critics have turned to data from the Office of Information and Regulatory Affairs (OIRA), which acts as a centralized clearinghouse for federal regulations, to make their case. During presidential transitions since 1988, OIRA has completed reviews of substantially more final rules than during the same months of non-transition years.³

Critics equate the increased quantity of completed OIRA reviews with an assumption that they are rushed and, therefore, less carefully conducted.⁴ Rep. Tim Walberg (R-Mich.) made this claim in March 2016 when his bill, the “Midnight Rule Relief Act,”⁵ which would place a moratorium on rulemakings during the presidential transition period, advanced in the U.S. House: *“Cutting corners and rushing through regulations leads to carelessly crafted rules that harm small businesses and their ability to thrive and create good-paying jobs. The Midnight Rule Relief Act will hold outgoing administrations accountable and ensure President Obama, and any future president, cannot slip through more costly red tape during his final days in office.”*⁶

The Midnight bill passed the U.S. House on July 7, fittingly at 12:03 a.m.⁷ But the bill’s advocates fail to acknowledge a fact that completely undercuts their case: The average rule completed during the Transition Periods at the end of the administrations of Presidents Bill Clinton and George W. Bush took longer, and underwent more days of OIRA review than the average rule over the past 17 years.

¹ Press Release, Office of Rep. Tim Walberg, *Walberg Bill Blocking Lame Duck Regulations Advances in House* (March 1, 2016), <http://bit.ly/29i8agl>.

² Sherzod Abdukadirov, *Midnight Regulations and the Decrease of OIRA Staff*, MERCATUS CENTER AT GEORGE MASON UNIVERSITY (Jan. 8, 2016), <http://bit.ly/29okWgy>.

³ *Id.*

⁴ Press Release, Office of Rep. Tim Walberg, *Walberg Bill Blocking Lame Duck Regulations Advances in House* (March 1, 2016), <http://bit.ly/29i8agl>.

⁵ Midnight Rule Relief Act of 2016, H.R. 4612, 114th Cong. (2016), <http://bit.ly/29MZFeL>. See also, companion legislation introduced in the U.S. Senate by Sen. Joni Ernst (R-Iowa). Midnight Rule Relief Act of 2016, S.2582, 114th Cong. (2016), <http://bit.ly/29Pli5e>.

⁶ Press Release, Office of Rep. Tim Walberg, *Walberg Bill Blocking Lame Duck Regulations Advances in House* (March 1, 2016), <http://bit.ly/29i8agl>.

⁷ Roll call vote for Federal Information Systems Safeguards Act, U.S. House of Representatives (July 7, 2016), <http://bit.ly/29C59ce>. The text for the Midnight Rule Relief Act was included in the legislation.

The disparity between perception and reality even holds true for the rulemaking that Walberg cites as the poster child for why the “Midnight Rule Relief Act” is needed. Walberg points to the “Energy Efficiency Standards for Clothes Washers,” a rule completed in 2001 by the outgoing Clinton administration. Walberg claims the rule’s entire rulemaking process was less than five-and-a-half months. His estimate is off by more than five-and-a-half *years*. The entire rulemaking process was actually more than six years, with many public hearings and requests for comments.

This study focuses on Economically Significant rules, which are defined as those expected to have an effect on the economy of \$100 million or more in a single year. It uses various measures to compare the time devoted to regulations completed between Election Day and the inauguration of the incoming president (hereinafter, “Transition Periods”) with those completed during non-Transition Periods.

Rulemaking Length

Final rules with completed OIRA reviews during Transition Periods took longer from start to finish, on average, than rules with completed reviews at other times.

- Economically Significant final rules with completed OIRA reviews in the Transition Periods of 2000 and 2008 had an average rulemaking length of 3.6 years. Final rules with completed reviews in non-Transition Periods between 1999 and 2015 took 2.8 years to complete.
- Economically Significant final rules with completed OIRA reviews in the Transition Period of 2000 took an average of 3.8 years to complete from start to finish – 90 percent longer than final rules with completed reviews between January 22 and October 31 the same year (2.0 years).
- Economically Significant final rules with completed OIRA reviews in the Transition Period of 2008 took an average of 3.3 years to complete – 3 percent longer than final rules with completed reviews between January 22 and October 31 (3.2 years).

Final Rule Review Length

OIRA generally reviews rules in several stages in the rulemaking process. The last of these is called the final rule stage. The lengths of OIRA’s final stage reviews of rules in the Transition Periods have been about the same, on average, as reviews completed during the non-Transition Periods of the same year.

- Economically Significant final rules with completed OIRA reviews in the Transition Periods of 2000 and 2008 received an average of 47 days of final stage review. Final rules with completed reviews during non-Transition Periods between 1999 and 2015 received 48 days of final stage review.
- In 2000, Economically Significant final rules with completed OIRA reviews in the Transition Period received an average of 50 days of final stage review. That was 28 percent, or 11 days, longer than final rules with completed reviews between January 22 and October 31 the same year (39 days).

- In 2008, Economically Significant final rules with completed OIRA reviews in the Transition Period received an average of 44 days of final stage review. That was 21 percent, or 12 days, shorter than final rules with completed reviews between January 22 and October 31 the same year (56 days).

Total OIRA Review Length (Prerule, Proposed and Final Rule Stages)

We added up the cumulative number of days of OIRA review for all stages, including the proposed rule stage, final rule stage and, where applicable, other stages. We then compared cumulative days of OIRA review for rules with completed reviews during the Transition Periods with completed reviews at other times.

- Economically Significant final rules with completed OIRA reviews in the Transition Periods of 2000 and 2008 received an average of 130 days of cumulative review. The average Economically Significant final rule reviewed by OIRA in non-Transition Periods between 1999 and 2015 received 115 days of cumulative review.
- Economically Significant final rules with completed OIRA reviews in the Transition Period in 2000 underwent a cumulative average OIRA review of 130 days – 76 percent, or 56 days, longer than final rules reviewed between January 22 and October 31 of the same year (74 days).
- Economically Significant final rules with completed OIRA reviews in the Transition Period in 2008 underwent a cumulative average OIRA review of 129 days – 15 percent, or 17 days, longer than final rules reviewed between January 22 and October 31 of the same year (112 days).

Methodology

The federal government publishes a semi-annual “Unified Agenda” of individual agencies’ ongoing and recently completed rulemakings. Separately, OIRA maintains a database of rules that it reviews. Each rule in the Unified Agenda and the OIRA data is identified by a Regulatory Identification Number (RIN), which is usually unique to that rulemaking.

In this report, we connect two different datasets by RIN in order to measure the length of rulemakings and the number of days that rules underwent review by OIRA. This review is limited to 1999 to present because the available dataset does not permit calculating accurate rulemaking lengths before 1999.

A. Determination of Rulemaking Length – Based on Unified Agenda Data

This report measures the length of completed rulemakings. A rulemaking is treated as completed when it appears in the Unified Agenda and two conditions are met: 1) The Rule Stage is reported as Completed Actions; and 2) the Action field incorporates the word “Final.” The majority of completed rules are described as a Final Action, Final Rule, or Interim Final Rule, but there are a small number of rules that are described slightly differently but still incorporate the word “Final.” The rulemaking lengths of rules that do not meet these two conditions are not included in this

analysis. Note that completion of a rule is distinct from OIRA’s completion of review of a rule. Subsequent to OIRA completing its work, an agency must publish the rule for it to be completed.

Determination of the Start of a Rulemaking: A rulemaking is treated as commencing three months prior to when it first appeared in the Unified Agenda. We arrived at this methodology because work on rulemakings appearing on the Unified Agenda for the first time must have commenced at some time in the six months prior to that Unified Agenda’s publication if they were reported correctly. Because there is no reported start date for the beginning of a rulemaking, we chose the midpoint of the possible range. For our research, spring Unified Agendas were dated April 1 and fall Unified Agendas were dated October 1.

Estimating the beginning of a rulemaking to be three months prior to its first publication on the Unified Agenda is a conservative estimate because many rulemakings likely started much earlier. This is supported by a 2009 Government Accountability Office (GAO) report, which found that “agency staff sometimes worked on certain issues related to the rulemaking years before commencement of the actual rulemaking, either as part of earlier, related rulemakings or policy development for the rule.”⁸

Unified Agenda data is available online dating to fall 1995 and has been published twice annually in every year since then except for 2012, when only one agenda was issued. Rulemakings appearing in the fall 1995 Unified Agenda are treated as commencing three months prior to publication, though it is likely many of the rulemakings actually began earlier and have longer rulemaking lengths than described in this analysis.⁹

Determination of the End of a Rulemaking: We deemed a rulemaking’s end date to be the latest date associated with it in the Unified Agenda’s Action Date field. Less than 1 percent of rules in this analysis have a negative or zero rulemaking length based on our methodology. This occurred because the rules’ completion dates were listed as occurring more than three months prior to the rulemakings’ first appearance in the Unified Agenda. Their rulemaking lengths are not included in this analysis.

In most cases, final rules with completed OIRA reviews appear on the subsequent Unified Agenda for the last time and have a last Action Date close to the OIRA final rule review completion date. In rare cases, the last Action Date on the Unified Agenda associated with a rulemaking occurs after a substantial amount of time has passed since the completed OIRA review. In these cases, the rulemaking length may end up being significantly longer than it was at the time that OIRA completed its review.

⁸ GOVERNMENT ACCOUNTABILITY OFFICE (GAO), FEDERAL RULEMAKING: IMPROVEMENTS NEEDED TO MONITORING AND EVALUATION OF RULES DEVELOPMENT AS WELL AS TO THE TRANSPARENCY OF OMB REGULATORY REVIEWS (April 2009), <http://1.usa.gov/28NMaPa>.

⁹ Six percent of rulemakings in this analysis appeared on the Unified Agenda for the first time in fall 1995

B. Determination of Lengths of OIRA Reviews

Executive Order 12866, signed by President Bill Clinton in 1993, permits OIRA to review rules that are deemed Significant under definitions in the executive order. Significant rules include those that are expected to have an annual cost of at least \$100 million or meet other criteria, such as raising “novel legal or policy issues.”¹⁰ Although the executive order calls on OIRA to complete its reviews in 90 days –with permission to extend to 120 days in unusual circumstances – OIRA reviews often take far longer in practice.¹¹ Rules reviewed by OIRA typically undergo review twice: at the proposed and final rules stages. Some rules undergo additional reviews.

Determination of an Economically Significant Rulemaking According to OIRA Data: The OIRA dataset includes a field labeled “Economically Significant” and each rule indicates either “Yes” or “No.” This analysis only includes final rules indicating “Yes” in this field.

Determination of the length of OIRA Review: OIRA data provides an exact date indicating when OIRA received a rule, along with the date the review was completed for each stage of review. We subtract the date the rule was received from the date the review was completed to measure the number of days the rule was under review.

Identifying “Midnight Regulations”: “Midnight regulations” is a rhetorical term with arbitrary definitions. We sought to analyze the same regulations as those deemed “midnight regulations” by Walberg and other critics. Walberg relies on data from the Mercatus Center at George Washington University, among others, when advocating for the “Midnight Rule Relief Act.”¹² By taking Economically Significant rules listed in the OIRA database in the “Final Rule,” “Interim Final Rule,” or “Final Rule No Material Change” (hereinafter, “final rules”) stage that were completed between Nov. 1 and Jan. 21¹³, we were able to exactly duplicate the numbers in Mercatus’ chart of Economically Significant OIRA reviews. The chart showed 229 Economically Significant final rule reviews between 1999 and 2014.¹⁴ We added 2015 to the dataset, which increased the total to 245.

Determination of the Transition Period Year: This report refers to Nov. 1, 2000, through Jan. 21, 2001, as the 2000 Transition Period. The 2008 Transition Period is Nov. 1, 2008, through Jan. 22, 2009. Therefore, “years” in the report refer to Jan. 22 to Jan. 21 of the following year. This means that the year 1999 refers to Jan. 22, 1999, to Jan. 21, 2000, and so forth.

¹⁰ Executive Order 12866 (Sept. 30, 1993), <http://1.usa.gov/22wdW3D>. Note: In the Unified Agenda, rules expected to result in costs of \$100 million or more are deemed “Economically Significant” while those deemed Significant due to other criteria are referred to as “Other Significant” In OIRA’s database, any rule deemed Significant is categorized as Yes under the Economically Significant heading.

¹¹ See, e.g., NEGAH MOUZON, PUBLIC CITIZEN, PUBLIC SAFEGUARDS PAST DUE: MISSED DEADLINES LEAVE PUBLIC UNPROTECTED, at 6 (June 2012), <http://bit.ly/22xTf7H>.

¹² Press Release, Office of Rep. Tim Walberg, *Walberg, Ernst, Johnson Introduce Bill to Block Costly Lame Duck Regulations* (Feb. 25, 2016), <http://bit.ly/29kEEcA>.

¹³ This time period is slightly different than the actual Transition period. We used it in order to reconcile our data with that of Mercatus.

¹⁴ Sherzod Abdukadirov, *Midnight Regulations and the Decrease of OIRA Staff*, MERCATUS CENTER AT GEORGE MASON UNIVERSITY (Jan. 8, 2016), <http://bit.ly/29okWgy>.

The Creation of a Boogeyman

“The rulemaking process for this major rule took less time than the comment period alone for the Clean Power Plan ...”
- Rep. Tim Walberg (R-Mich.)¹⁵

In his speech discussing the Midnight Rule Relief Act, Walberg proclaims there is little “*opportunity for constructive feedback ...*”¹⁶ for rules reviewed in the Transition Period.

To support his argument, he cites a Department of Energy (DOE) rule reviewed by OIRA during the Transition Period of the outgoing Clinton administration. The rule, the “Energy Efficiency Standards for Clothes Washers,” created energy efficiency standards for clothes washers, which Walberg describes as “*mandating stores sell government-approved washing machines.*”¹⁷

Walberg said in a speech on the U.S. House floor accompanying introduction of the rule, “*In one of these midnight rules, the Clinton Administration published a proposed rule on residential clothes washers mandating stores sell government-approved washing machines considered to be ‘more efficient.’ Just three months later, and eight days before the end of his term, the final rule with far reaching effects for household appliances was published. [The] rulemaking process for this major rule took less time than the comment period for the Clean Power Plan.*”¹⁸

The Clean Power Plan comment period was just over five months.¹⁹ For the Clothes Washer rule, it appears that Walberg is describing the time between publication of the Notice of Proposed Rulemaking (NPRM) to publication of the final rule (Oct. 5, 2000 to Jan. 12, 2001) as the entire “*rulemaking process.*” These phases do not remotely describe the entirety of the rulemaking process. Walberg’s estimate is off by roughly five-and-a-half years. The rule did not become final until six years after issuance of the Advance Notice of Proposed Rulemaking (ANPRM) and many *opportunities for constructive feedback* had been offered.²⁰ [Figure 1]

¹⁵ Rep. Tim Walberg, *Walberg Introduces Bill to Block Costly Lame Duck Regulations*, YOUTUBE (March 1, 2016), <http://bit.ly/29sT6Ox>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 FEDERAL REGISTER 59550, 59550-59588 (Sept. 25, 2014), <http://bit.ly/29zAVr1>.

²⁰ See RegInfo (viewed on July 13, 2016), <http://bit.ly/29J7XWM>.

Figure 1: Rulemaking Timeline for the 6 Year - “Midnight” - Clothes Washer Rulemaking That Walberg Alleges Took Less Than 6 Months



Economically Significant Rulemakings Completed in the Transition Periods Have Taken Longer Than Average

The Clothes Washer Rulemaking is not an anomaly. On average, Economically Significant final rules with completed OIRA reviews during the Transition Periods of the outgoing Clinton and George W. Bush Administrations took more than three years.

A. Quantity of Completed Final Rule Reviews

Table 1: Number of Completed OIRA Economically Significant Final Rule Reviews

The Office of Information and Regulatory Affairs (OIRA) completed review of substantially more Economically Significant final rules during the Transition Period in 2000 and 2008 than in the same months in all other years in this analysis. [See Table 1]

In 2000, 51 percent of the final rule reviews occurred in the Transition Period. In 2008, it was 42 percent. In all other years since 1999, only 23 percent of final rule reviews occurred between Nov. 1 and Jan. 21.

Year	OIRA Completed Final Rule Reviews			Total
	Jan 22 – Oct 31	Nov 1 – Jan 21 (Jan. 21 of following year)		
	#	#	% of Total	
1999	31	6	16%	37
2000	35	37	51%	72
2001	39	8	17%	47
2002	38	5	12%	43
2003	37	14	27%	51
2004	34	14	29%	48
2005	36	7	16%	43
2006	24	8	25%	32
2007	30	15	33%	45
2008	44	32	42%	76
2009	43	19	31%	62
2010	59	14	19%	73
2011	48	11	19%	59
2012	38	14	27%	52
2013	39	14	26%	53
2014	45	11	20%	56
2015	50	16	24%	66
Total	670	245	27%	915

B. Rulemaking Length of Economically Significant Final Rules Reviewed by OIRA

Economically Significant final rules with completed OIRA reviews during the 2000 and 2008 Transition Periods took an average of 3.6 years to complete. Economically Significant final rules with completed OIRA reviews in non-Transition Periods between 1999 and 2015 had an average rulemaking length of 2.8 years. [Table 2]

Table 2: Average Rulemaking Length of Economically Significant Final Rules Reviewed by OIRA

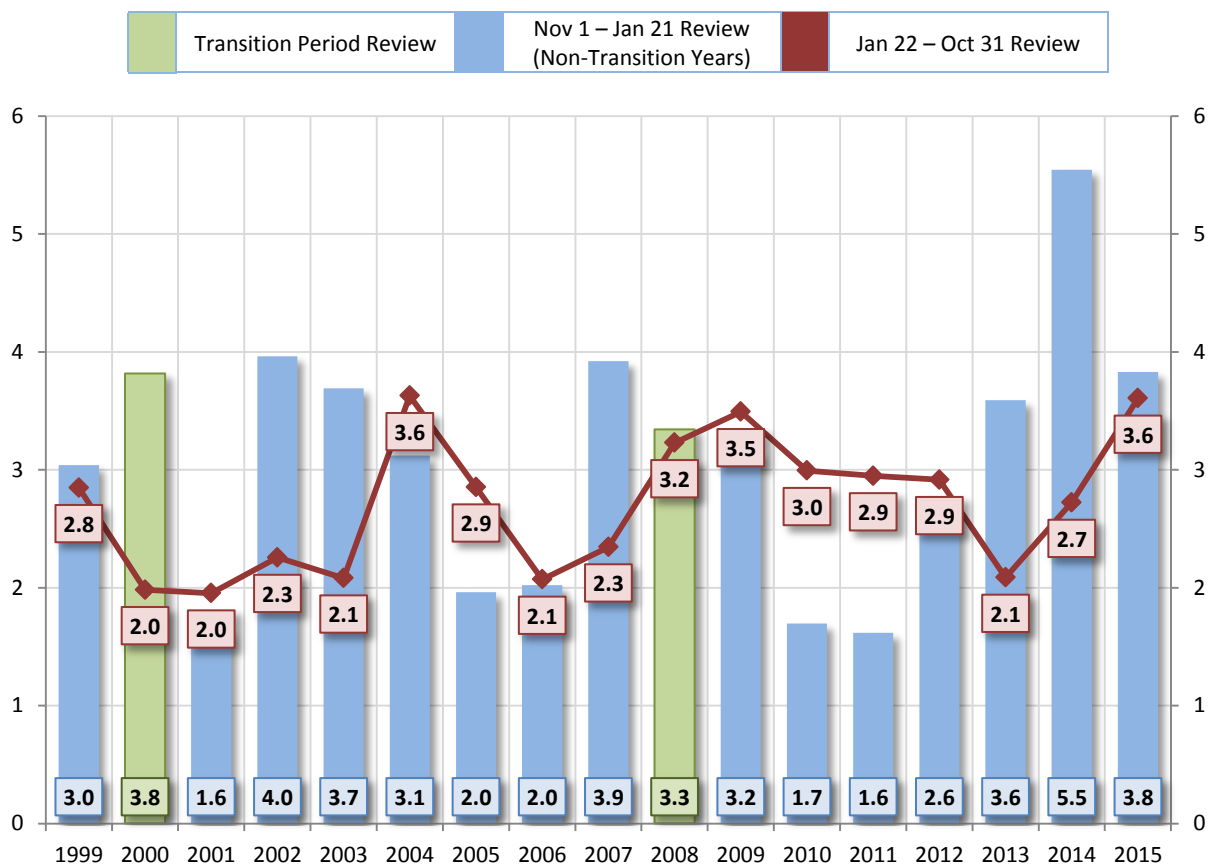
	Average Rulemaking Length
All OIRA Economically Significant Reviewed Final Rules 1999-2015	2.9
Economically Significant Final Rules 1999-2015, excluding Transition Periods	2.8
Nov 1 – Jan 21 Reviewed Final Rules (1999 – 2015 excluding 2000 & 2008)	3.1
2000 & 2008 Transition Period Rules	3.6
2000 Transition Period Reviewed Final Rules	3.8
2008 Transition Period Reviewed Final Rules	3.3

In 2000, Economically Significant final rules with completed OIRA reviews in the Transition Periods had an average rulemaking length of 3.8 years – 90 percent longer than rules reviewed between January 22 and October 31 the same year (2.0).

Final rules with completed OIRA reviews in the Transition Period of 2000 had a longer average rulemaking than rules with completed reviews between Jan. 22 and Oct. 31 in all 17 years analyzed.

In 2008, Economically Significant final rules with completed OIRA reviews in the Transition Period had an average rulemaking length of 3.3 years – 3 percent longer than rules reviewed between January 22 and October 31 the same year (3.2 years). [Figure 2]

Figure 2: Average Rulemaking Length of Economically Significant Final Rules by Timeframe of OIRA Review



Length of OIRA Reviews, ‘Midnight’ Period vs. Other Times

A. Number of Days Economically Significant Final Rules are Under Review at OIRA

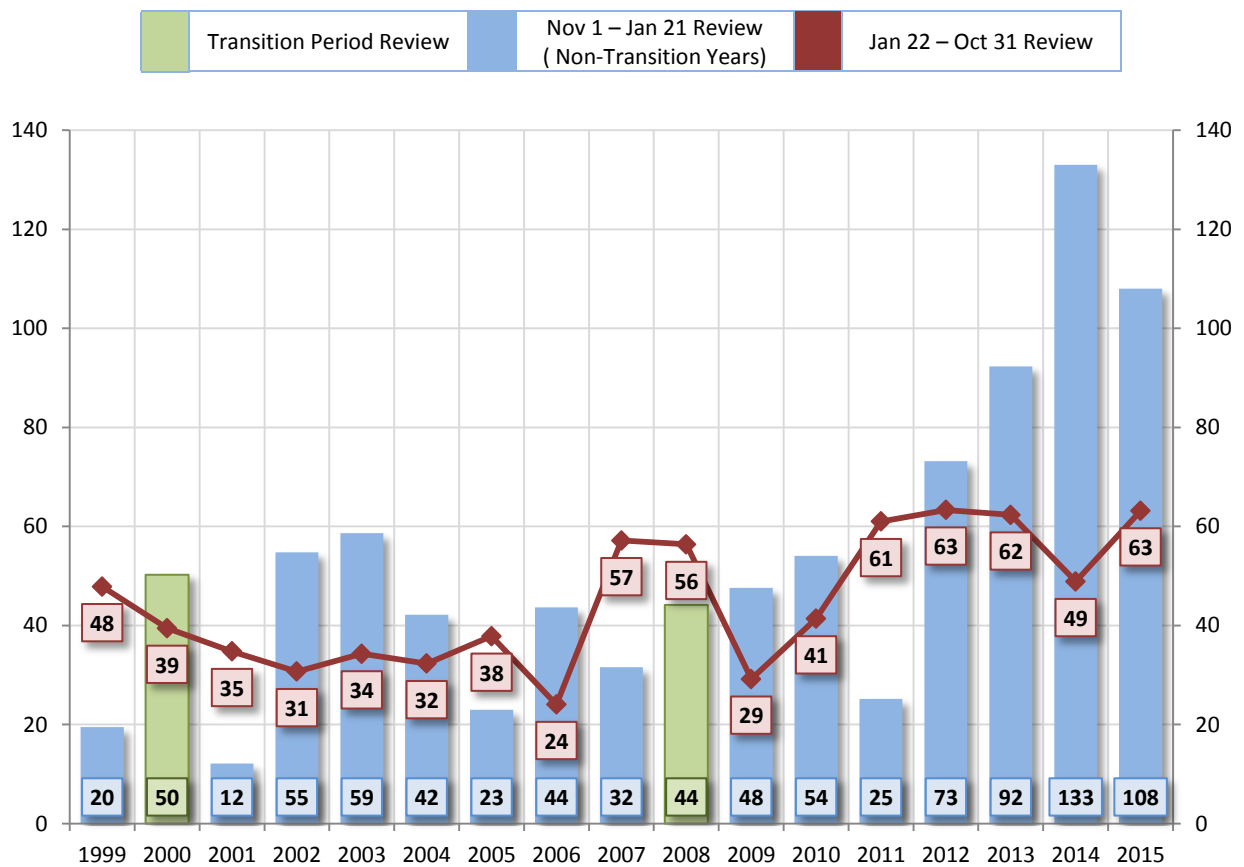
The OIRA dataset indicates when the agency received a final rule and also when it completed the review. There is no sign that those reviewed in Transition Periods were rushed.

Economically Significant final rules with completed OIRA reviews in the Transition Periods of 2000 and 2008 received an average of 47 days of final stage review. Final rules with completed OIRA reviews during non-Transition Periods between 1999 and 2015 received 48 days of review.

Economically Significant final rules with completed OIRA reviews during the Transition Period in 2000 received an average of 50 days final stage review. This was 28 percent, or 11 days, longer than final rules with completed OIRA reviews between Jan. 22 and Oct. 31 of that year (39 days).

Final rules with completed OIRA reviews during the Transition Period in 2008 were under review for 44 days on average. That was 21 percent, 12 days, shorter than final rules reviewed between Jan. 22 and Oct. 31 the same year (56 days). [Figure 3]

Figure 3: Average Number of Days for OIRA to Complete Review of Economically Significant Final Rules

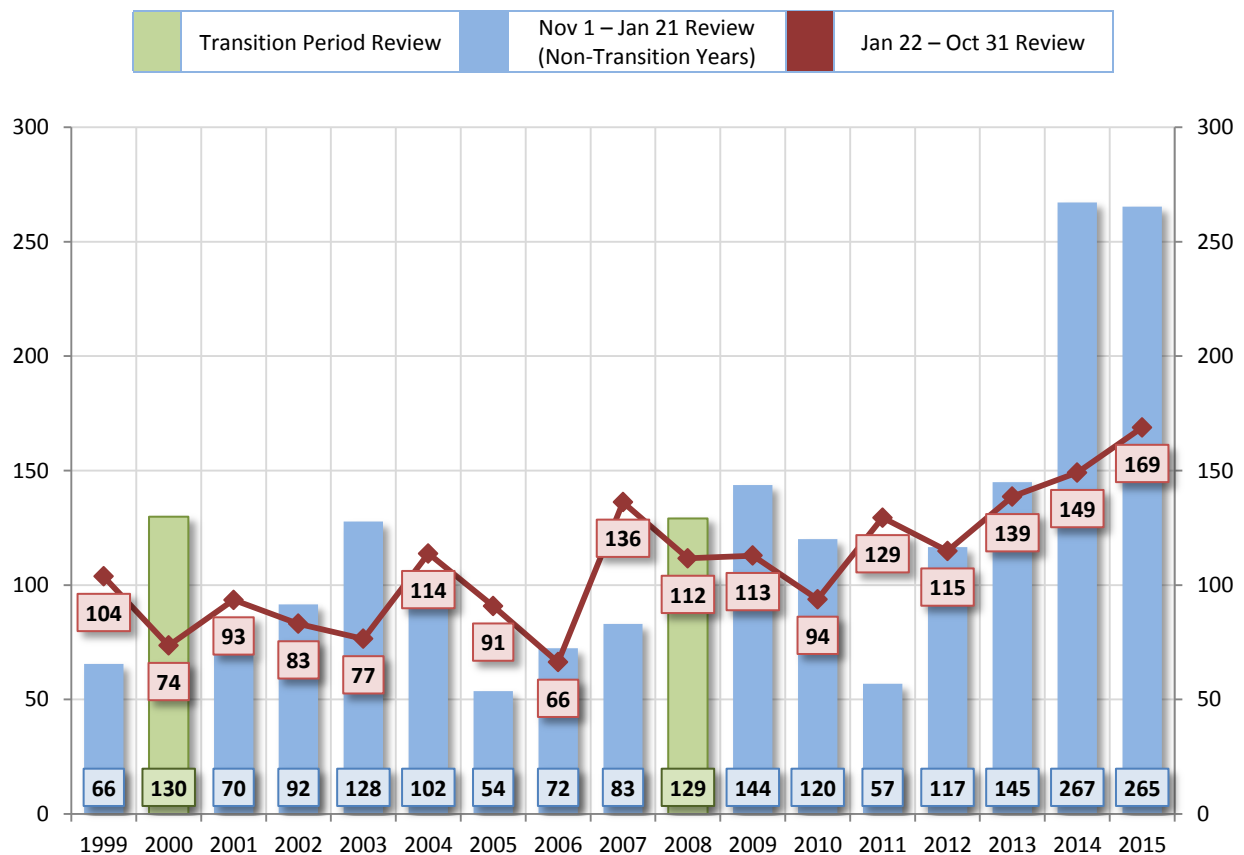


B. Average of Total Review Length (Including Proposed and Final Rule Stages)

OIRA may review rules in phases aside from final stage review. Often, this includes the “Proposed Rule” rule stage. Less frequently, it may include the “Prerule” or “Notice” stages.

Economically Significant final rules with completed OIRA reviews in the Transition Periods of 2000 and 2008 underwent an average of 130 cumulative days of OIRA review. That was 15 days longer than final rules with completed OIRA reviews in non-Transition Periods from 1999 through 2015 (115 days). [Figure 4]

Figure 4: Average Cumulative Number of Days Final Rules are Under OIRA Review



Economically Significant final rules with completed reviews in the Transition Period in 2000 had an average cumulative review time of 130 days – 76 percent, or 56 days, longer than final rules reviewed between January 22 and October 31 the same year (74 days).

Economically Significant final rules with completed reviews in the Transition Period in 2008 had an average cumulative review time 129 days – 15 percent, or 17 days longer than final rules reviewed between January 22 and October 31 the same year (112 days).

C. Quantity of OIRA Reviews as an Indication of Quality of Reviews

Due to the increase in the number of rules under review, Walberg and others have argued that the final rule reviews may be “*rushed and flawed*” because OIRA is overwhelmed.²¹ Groups cited by Walberg show a decrease in OIRA staff along with the increase in quantity of reviews to imply that OIRA may be overwhelmed during the Transition Period.²²

This notion of a flawed review is the main rationale behind the Midnight Rule Relief Act, as the Background and Need for Legislation section of the report submitted by the Committee on Oversight and Government Reform states. “*The surge in midnight rules can overwhelm the Office of Information and Regulatory Affairs (OIRA), the entity charged with reviewing the quality of proposed agency rules. This can result in rushed and flawed oversight, further undermining the quality of review for proposed rules.*”²³

The idea that more reviews will result in lower quality reviews relies on broad assumptions about the capability of OIRA staff. It assumes OIRA staff is only able to review a certain number of rules in a given time period, and that its review capacity remains constant. Further, it assumes that reviews take standard amounts of time.

Economically Significant rulemakings differ, and the final rule review of each rule may take longer or shorter than others for a number of reasons. Therefore, this analysis focuses on how long final rules were under review, according to OIRA, and makes no assumptions about the number of final rule reviews OIRA employees are capable of reviewing in a given year or in a certain timeframe.

In a December 2015 memo to deputy secretaries of cabinet agencies, current OIRA Administrator Howard Shelanski encouraged agencies to submit rules by the summer of 2016. But he also indicated all rules will receive “*the careful consideration they are due under relevant statutes, applicable executive orders, including Executive Orders 12866 and 13563, and related guidance, such as Office of Management and Budget Circular A-4*”²⁴

It is reasonable for OIRA to prefer rule reviews to be more evenly spread out throughout the year. But that does not indicate that OIRA is overwhelmed and “rushing” out “flawed” reviews.

²¹ Committee on Oversight and Government Reform, Midnight Rule Relief Act of 2016, <http://bit.ly/29lumKF>.

²² Sherzod Abdulkadirov, *Midnight Regulations and the Decrease of OIRA Staff*, MERCATUS CENTER AT GEORGE MASON UNIVERSITY, (Jan. 8, 2016), <http://bit.ly/29okWgy>.

²³ Committee on Oversight and Government Reform, Midnight Rule Relief Act of 2016, <http://bit.ly/29lumKF>.

²⁴ HOWARD SHELANSKI, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, MEMORANDUM FOR REGULATORY REVIEW AT THE END OF THE ADMINISTRATION (Dec. 17, 2015), <http://bit.ly/29i98cU>.

Conclusion

The phrase “midnight” implies actions under cover of darkness, when no one is looking – a cartoonish characterization that attempts to conjure up an image of a president suddenly waking up in the final weeks of an administration and enacting important rules. But the dataset shows that final rules reviewed in the Transition Periods have had rulemaking lengths of more than three years, and were under review for longer or a similar number of days on average than rules reviewed outside of the period.

Tax accountants work more hours and complete more tax reviews between January and April each year, but are not accused of producing flawed tax reviews simply because they are producing more of them. Yet critics of midnight regulations use this same rationale to cast blanket assumptions on OIRA reviews during an outgoing presidential administration. And their claims rely on deception, such as alleging a six-year long rulemaking took less than five-and-a half months to complete.

In support of his bill, Walberg’s office explains; *“this concept has been raised by both Republicans and Democrats. Senator Harry Reid and Congressman Jerry Nadler, for example, introduced bills in 2009 that opposed midnight rules from going into effect in the closing days of the Bush Administration.”*²⁵

Walberg is correct that Democrats proposed bills to stop “midnight regulations” by the outgoing George W. Bush administration.²⁶ Walberg gives the false impression that his bill will treat presidents equally – regardless of administration or political ideology, saying *“It’s time to say goodnight to midnight regulations – from both parties.”*²⁷ But Walberg’s bill would do nothing to limit a president’s deregulatory actions in the final months of an administration, as the bill creates an exception “that an agency may propose or finalize a midnight rule if the [OIRA] administrator determines that the midnight rule is deregulatory in nature.”²⁸ Therefore, a late breaking rule by the Bush administration to allow concealed firearms in national parks would have been exempt from the prohibition if the OIRA administrator deemed that rule deregulatory.²⁹

Walberg and his peers on the House Government Reform Committee also appear intent on blocking regulations that are not plausibly of the “midnight” nature. Rep. Elijah Cummings (D-Md.) proposed an amendment that would exempt rules that have been listed on the Unified Agenda for more than

²⁵ Press Release, Office of Rep. Tim Walberg, *Walberg, Ernst, Johnson Introduce Bill to Block Costly Lame Duck Regulations*, (Feb. 25, 2016), <http://bit.ly/29kEEcA>.

²⁶ Charlie Savage, *Democrats Look for Ways to Undo Late Bush Administration Rules*, NEW YORK TIMES (Jan. 11, 2009), <http://nyti.ms/29h6bcM>.

²⁷ Press Release, Office of Rep. Tim Walberg, *Walberg, Ernst, Johnson Introduce Bill to Block Costly Lame Duck Regulations*, (Feb. 25, 2016), <http://bit.ly/29kEEcA>.

²⁸ Midnight Rule Relief Act of 2016, H.R. 4612, 114th Cong. (2016), <http://bit.ly/29MZEeL>.

²⁹ Jesse Nankin, *Midnight Reg: Guns in National Parks Now A-OK!*, PROPUBLICA (Dec. 5, 2008), <http://bit.ly/29Ilc7t>.

one year. These rules, almost by definition, are not rushed. But Republican members voted unanimously against the proposal.³⁰

If the Midnight Rule Relief Act’s 10-week moratorium on *non-deregulatory* rules is enacted, and administrations adapt by finishing more regulations in the three months before Election Day, critics of regulation likely will attempt to increase the length of the moratorium. And, there has already been at least one attempt to institute a longer moratorium than Walberg’s bill would. After Walberg’s “Midnight Rule Relief Act” moved forward in the U.S. House in March 2016, Rep. Tom Price (R-Ga.) introduced H.R. 4956, the “End Executive Overreach Act.”³¹ Instead of enacting a moratorium between Election Day and Inauguration Day, Price’s legislation would suspend rulemaking authority on Economically Significant and major rules from the “*beginning on the date of the enactment of this Act, and ending on January 21, 2017.*”³² Price introduced the bill on April 15, 2016 – 207 days before Election Day.³³

It is a fact that OIRA reviewed substantially more Economically Significant final rules during the outgoing Clinton and George W. Bush administrations. But claiming that the increase in the number of final rules reviewed by OIRA alone indicates that administrations are “rushing”³⁴ out rules is not supported by the evidence.

³⁰ Committee on Oversight and Government Reform, *Midnight Rule Relief Act of 2016*, at 5-6, <http://bit.ly/29lumKF>.

³¹ Press Release, Office of Rep. Tom Price, *Price Introduces Bill to Stop Obama Administration’s Usurpation of Legislative Authority* (April 15, 2016), <http://bit.ly/29i5q2Z>.

³² See, *The End Executive Overreach Act*, S. 3, 114th Cong. (2016), <http://bit.ly/29jPGl0>.

³³ Press Release, Office of Rep. Tom Price, *Price Introduces Bill to Stop Obama Administration’s Usurpation of Legislative Authority* (April 15, 2016), <http://bit.ly/29i5q2Z>.

³⁴ Press Release, Office of Rep. Tim Walberg, *Walberg Bill Blocking Lame Duck Regulations Advances in House* (March 1, 2016), <http://bit.ly/29i8agl>.