



Testimony of
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Before the
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
US House of Representatives
On
Midnight Rulemaking: Shedding Some Light

February 4, 2009

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to testify before you today. I am Gary Bass, Executive Director of OMB Watch. OMB Watch is a nonprofit, nonpartisan research and advocacy center promoting an open, accountable government responsive to the public's needs. Founded in 1983 to remove the veil of secrecy from the White House Office of Management and Budget (OMB), OMB Watch has since then expanded its focus beyond monitoring OMB itself. We currently address four issue areas: right to know and access to government information; advocacy rights of nonprofits; effective budget and tax policies; and the use of regulatory policy to protect the public. OMB Watch does not receive any government funding.

My testimony today focuses on: 1) President George Bush's midnight regulation strategy, and 2) President Barack Obama's response to those midnight regulations. Before addressing these points, I want to acknowledge the trend of presidents to issue a rush of regulations at the close of their administrations. This should not be surprising: presidents often work furiously to leave a legacy or to achieve their priorities especially towards the end of their terms. Too often, however, these last minute rules are hurried through a very complex rulemaking process and may be poorly vetted. This approach may not only lead to poor policy decisions but may greatly endanger public health and safety, workplace protections, civil rights and liberties, and environmental quality.

Recent presidents have made it a common practice to try to complete as many regulations as possible in the waning days of their administrations. It has also become common practice for new presidents to issue memoranda and take other actions they deem appropriate to stop the rules just completed by the previous administration (assuming the new president is of the opposite party). This back-and-forth between administrations adds yet one more disruptive feature to the monumental task, especially at the level of federal regulatory agencies, of preparing a new presidential administration for governing. It also highlights the increasingly

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partisan use of the rulemaking process to achieve policy goals that an administration may not be able to achieve through legislative means.

I. President Bush's Midnight Regulations

I want to focus my testimony on the Bush administration's midnight rulemaking activities. I will not discuss how President Bush's approach varied from previous presidents or whether it was better or worse than President Clinton's last months. There are empirical studies that allow comparison among administrations and identify trends in midnight rulemaking that provide valuable historical perspectives on these topics.¹ Our perspective, however, is that the discussion of midnight regulations is not a question of whether President Bush had more or fewer regulations than another president. The issue is the substance and impact of the regulatory decisions. It would not matter if a flurry of bad regulations were published at midnight or noon time in an administration's life span. Bad rules that run counter to legislative intent and public interests should be rectified.

A May 9, 2008, memo from Bush White House Chief of Staff Joshua Bolten directed federal agencies to submit by June 1 proposed rules that they wished to finalize before the administration's term ended except in "extraordinary circumstances." The memo also indicated that all final rules to be published by this administration should be completed by November 1, thereby eliminating the possibility of "midnight regulations."

The first paragraph of the Bolten memo reads, in part:

"The President has emphasized that the American people deserve a regulatory system that protects and improves their health, safety and environment, secures their rights, and ensures a fair and competitive economic system, while respecting their prerogative to make their own decisions and not imposing unnecessary costs. We need to continue this principled approach to regulation as we sprint to the finish, and resist the historical tendency of administrations to increase regulatory activity in their final months."²

The country soon learned, however, that the language in the memo was more smokescreen than good government policy. The deadlines in the memo were ignored as the administration set out to finalize and get into effect a series of deregulatory actions. By getting these rules into effect, the hands of the next administration – whether Democrat or Republican – would be tied, thus extending the policy priorities of the Bush administration into the future. In reality, the memo simply changed when the clock reached midnight in order to insulate potentially controversial rules from disapproval by a new administration.

The responsibility for implementing the Bolten memo was assigned to the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB). OIRA has the responsibility for reviewing agencies' significant regulations under Executive Order 12866,

¹ See, for example, Jerry Brito and Veronique de Rugy, "For Whom the Bell Tolls: The Midnight Regulation Phenomenon", *Mercatus Policy Series*, Policy Primer No. 9. Arlington, VA: Mercatus Center at George Mason University, December 2008, available at <http://www.mercatus.org/PDFDownload.aspx?contentID=25654>. See Anne Joseph O'Connell, *Cleaning Up and Launching Ahead: What President Obama Can Learn from Previous Administrations in Establishing his Regulatory Agenda*, Washington, DC: Center for American Progress, January 2009, available at http://www.americanprogress.org/issues/2009/01/pdf/presidential_appointments.pdf.

² See [<http://www.ombwatch.org/regs/PDFs/BoltenMemo050908.pdf>] for a copy of the memorandum.

Regulatory Planning and Review (E.O. 12866). The current regulatory process, with its numerous requirements, obstacles, and reviews, generally means that it takes 3-5 years for significant regulations to be completed. For some agencies it takes far longer to promulgate rules – sometimes a decade or more. The Bush administration, which was particularly anti-regulatory, was reluctant to regulate in many areas such as environmental quality, workplace safety, and consumer protection unless under court ordered deadline, an emergency situation, or pressure from Congress.

Ironically, the Bush administration chose to use regulations at the end of its term to promote its anti-regulatory philosophy. Many of the Bush midnight regulations were deregulatory actions or favors to special interests. As Table I illustrates, the deadlines in the Bolten memo were largely irrelevant as the administration sought to cement its policy preferences. Table I looks at final rules that were published by the Bush administration, starting one month before the November 1 deadline in the Bolten memo, and that have been identified as troublesome by a broad coalition of organizations. By no means is this a comprehensive list of all troublesome rules; but this does capture many problematic ones.

| Table I Troublesome Midnight Regulations Published Since October 1, 2008: Compliance with the Bolten Memo | | |
|--|-----------------------------------|------------------------------------|
| Regulation Agency | Proposed after June 1, 2008 | Finalized after Nov. 1, 2008 |
| Country-of-origin labeling Agricultural Marketing Service | | X (1/15/2009) |
| Partner Vetting System U.S. Agency for International Development | | X (1/2/2009) |
| Pledge requirements for HIV/AIDS grantees Department of Health and Human Services | | X (12/24/2008) |
| Exemption of information reporting for federal contractors Wage and Hour Division | X (10/20/08) | X (12/19/2008) |
| Privatization of public toll roads Federal Highway Administration | X (10/8/08) | X (12/19/2008) |
| Access to reproductive health services Department of Health and Human Services | X (8/26/08) | X (12/19/2008) |
| Certification for the Employment of H-2B Aliens Employment and Training Administration | | X (12/19/2008) |
| Burning of hazardous waste Environmental Protection Agency | | X (12/19/2008) |
| Revisions to the H-2A guestworker program Employment and Training Administration | | X (12/18/2008) |

| Table I (continued) | | |
|--|-----------------------------------|------------------------------------|
| Regulation Agency | Proposed after June 1, 2008 | Finalized after Nov. 1, 2008 |
| Air pollution reporting from farms Environmental Protection Agency | | X (12/18/2008) |
| Endangered species consultation - Fish and Wildlife Service/National Oceanic and Atmospheric Administration | X (8/15/08) | X (12/16/2008) |
| Mountaintop mining Office of Surface Mining | | X (12/12/2008) |
| Gun safety in national parks National Park Service | | X (12/10/2008) |
| Vertical tandem lifts Occupational Safety and Health Administration | | X (12/10/2008) |
| Emergency land withdrawals Bureau of Land Management | X (10/10/08) | X (12/5/2008) |
| Rerouting hazmat rail shipments Pipeline and Hazardous Materials Safety Administration | | X (11/26/2008) |
| Rail transportation security Transportation Security Administration | | X (11/26/2008) |
| Runoff from factory farms Environmental Protection Agency | | X (11/20/2008) |
| Truck driver hours of service Federal Motor Carrier Safety Administration | | X (11/19/2008) |
| Oil shale development Bureau of Land Management | X (7/23/08) | X (11/18/2008) |
| Family and medical leave Wage and Hour Division | | X (11/17/2008) |
| Medicaid outpatient services Centers for Medicare and Medicaid Services | | X (11/7/2008) |
| Definition of solid waste Environmental Protection Agency | | (10/30/2008) |
| Employment verification by social security records Department of Homeland Security | | (10/28/2008) |
| Union annual reports for trusts Office of Labor-Management Standards | | (10/2/2008) |
| Total: 25 troublesome rules | 6 missed deadline | 22 missed deadline |

Not only were six of the controversial rules proposed after the June 1st deadline, but more importantly, 22 of the 25 rules became final after the November 1 deadline. As it turns out, the November 1 deadline was actually a strategic marker for the Bush administration, not really a deadline. The Bush administration did not want the next administration to do as it did to the Clinton regulations: put a hold on them and possibly scuttle them. So the Bush administration wanted its final rules to become effective before January 20, 2009, when the new president took over.³ This meant that November 20, 60 days before the inauguration of the new president, was the first real deadline for major rules. The absolute final date was December 20, 30 days before the inaugural. As might be expected, 15 of the 25 controversial rules have become effective since January 1, 2009 – literally the last weeks of the Bush administration – and five of these became effective in the last 60 hours of the administration. For example:

- The Environmental Protection Agency (EPA) published a final rule December 18th exempting factory farms from reporting air pollution emissions from animal waste; the rule became effective January 20th.
- The Department of Health and Human Services (HHS) published a final rule December 19th that will likely limit women's access to health services by requiring health care providers to certify that they will allow their employees to withhold services on the basis of religious or moral grounds or risk losing federal funds; the rule became effective January 20th.
- The Department of Transportation published a final rule November 19th allowing truck drivers to drive up to 11 consecutive hours and shortening mandatory rest times; the rule became effective January 19th. (The rule is nearly identical to a rule struck down in the DC Court of Appeals in 2007.)⁴

Despite the delays and complexities of the regulatory process, the Bush administration was able to complete several rules in an unusually short period of time. In some cases, agencies shortened public comment periods in order to accelerate a rule's progress. The result was that important rules were completed in a few months; some were never even announced in the Unified Agenda which lists agency regulatory work plans every six months. Table II contains a list of rules that were proposed and completed in a remarkably short time.

³ A rule is considered "final" when it is published in the *Federal Register*; there is a subsequent waiting period, either 30 or 60 days depending on the significance of the regulation, before the rule become "effective" and is implemented.

⁴ For a large but partial list of midnight regulations, see the chart at the end of this written testimony.

Table II
Examples of Rushed Regulations

| Regulation - Agency | Timeline | Length of comment period | Evidence of a rush toward completion |
|---|--|--|---|
| <p>Pledge requirements for HIV/AIDS grantees - Department of Health and Human Services</p> | <p>Proposed April 17, 2008; Finalized Dec. 24, 2008; <i>Elapsed time of about eight months.</i></p> | <p>Originally 32 days, reopened for another 32 days.</p> | <p>The regulation went into effect on Jan. 20, only 27 days after final publication. Under the Administrative Procedure Act, agencies must wait at least 30 days before considering a rule effective.</p> |
| <p>Gun safety in national parks - National Park Service</p> | <p>Proposed April 30, 2008; Finalized Dec. 10, 2008; <i>Elapsed time of about 7.5 months</i></p> | <p>Originally 61 days, reopened for another 30 days.</p> | <p>The agency changed provisions in the final rule without soliciting public comment. The agency included a provision in the final rule allowing guns to be carried in national parks located in states with conceal and carry laws (all but Illinois and Wisconsin). The proposed rule said guns would only be allowed to be carried in national parks located in states that allowed guns to be carried in state parks.</p> |
| <p>Oil shale development - Bureau of Land Management</p> | <p>Proposed July 23, 2008; Finalized Nov. 18, 2008; <i>Elapsed time of about four months.</i></p> | <p>61 days</p> | <p>The agency published the proposed rule in FY 2008, even though an appropriations rider prohibited it from using funds to prepare or finalize regulations on oil shale development.</p> |
| <p>Endangered species consultation - Fish and Wildlife Service/National Oceanic and Atmospheric Administration</p> | <p>Proposed Aug. 15, 2008; Finalized Dec. 16, 2008; <i>Elapsed time of four months.</i></p> | <p>Originally 31 days, extended by another 29 days.</p> | <p>According to the final rule, the agency received approximately 235,000 comments on the proposal. The Associated Press reported that agency officials pressured staff to review all the comments in just one week. One calculation estimated the staff assigned to reviewing comments would have to review seven comments per minute.</p> <p>The agency added new material to the final rule (a provision forbidding the consideration of global warming in species decisions) without soliciting public comment.</p> |
| <p>Access to reproductive health services - Department of Health and Human Services</p> | <p>Proposed Aug. 26, 2008; Finalized Dec. 19, 2008; <i>Elapsed time of less than four months.</i></p> | <p>30 days</p> | <p>The White House Office of Management and Budget reviewed a draft of the proposed regulation in only hours, a process usually measured in weeks or months. The proposal was published online by HHS later that same day.</p> |

| Table II (continued) | | | |
|--|--|---------------------------------|--|
| Regulation - Agency | Timeline | Length of comment period | Evidence of a rush toward completion |
| Exemption of information reporting for federal contractors - Wage and Hour Division | Proposed Oct. 20, 2008; Finalized Dec. 19, 2008; <i>Elapsed time of two months</i> | 30 days | Although the rule was deemed significant, it does not appear to have been reviewed by OMB at either the proposed or final stage. The agency did not extend the comment period beyond 30 days, despite requests from Congress to do so. |
| Emergency land withdrawals - Bureau of Land Management | Proposed Oct. 10, 2008; Finalized Dec. 5, 2008; <i>Elapsed time of less than two months.</i> | 17 days. | The agency allowed only 17 days for public comment on the rule. An Interior Department official defended the shortened comment period, saying the public already had been given a chance to comment on an earlier draft of the rule that was released in 1991. |

From September 1st through the end of 2008, OIRA approved 157 final rules according to data on RegInfo.gov. The office reviewed 83 rules during the same time period in 2007, 92 in the last quarter of 2006, and 81 rules over the same time period in 2005.⁵ On average, OIRA spent 61 days in 2008 reviewing rules but completed many of these rules far more quickly. For example, OIRA reviewed the HHS final rule mentioned above in 11 days; it reviewed a Department of Interior rule in four days.⁶

In addition, in order to hurry through regulations like those in Table II, agencies often reduced the time allowed for public comment from the normal 60 days to 30 days or even less. For example, the Department of Interior rule noted above consisted of a 17 day comment period. The rule is hardly a minor rule by the definitions in E.O. 12866⁷; it runs contrary to federal law by eliminating Congress’s authority to preserve land from development in emergency situations.

⁵ See Reece Rushing, et al, *After Midnight: The Bush Legacy of Deregulation and What Obama Can Do*, Washington, DC: a joint publication of the Center for American Progress and OMB Watch, January 2009, p.3. Available at http://www.americanprogress.org/issues/2009/01/after_midnight.html and <http://www.ombwatch.org/article/articleview/4453/1/432?TopicID=3>.

⁶ *Ibid.*, p. 4.

⁷ E.O. 12866 Section 3(f) reads: (f) “Significant regulatory action” means any regulatory action that is likely to result in a regulation that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.

The Bush administration's shrewd timing handcuffs the Obama administration from repealing Bush-era regulations without expending significant resources. Had Bush waited until January to finalize those controversial regulations — thereby missing the opportunity to close the 30- or 60-day effective date window during his term — the Obama administration would have had an opportunity to delay the rules' effective dates and/or reevaluate the content of the regulations. (The Bush administration employed such a strategy upon taking office, delaying dozens of controversial Clinton-era regulations.)

II. President Obama's Response to Bush's Midnight Regulations

Just hours after President Barack Obama took the oath of office on Jan. 20, new White House Chief of Staff Rahm Emanuel issued a memo to executive branch agency heads setting out the Obama administration's policy for dealing with some regulations of the Bush administration.⁸ The Emanuel memo:⁹ 1) puts a freeze on all regulations still in the pipeline (i.e., proposed and final rules that have not yet been published in the *Federal Register*), and 2) gives agencies leeway to deal with those Bush-era final regulations already published in the *Federal Register* (i.e., finalized), but not yet effective (i.e., being implemented). However, the memo does not address the many regulations made final and effective by January 20, when Obama became president. A follow-up memo was issued on Jan. 21 by OMB Director Peter Orszag explaining to agency heads how to implement part of the Emanuel memo.¹⁰

Regulations in the Pipeline

The Emanuel memo states, "No proposed or final regulation should be sent to the Office of the Federal Register (the "OFR") for publication unless and until it has been reviewed and approved by a department or agency head appointed or designated by the President after noon on January 20, 2009." The memo also requests agencies to "Withdraw from the OFR all proposed or final regulations that have not been published in the Federal Register so that they can be reviewed and approved by a department or agency head." It makes exceptions for regulations that address "urgent circumstances relating to health, safety, environmental, financial, or national security matters," as well as regulations needed to meet statutory or judicial deadlines.

The moratorium covers all regulations in any stage of the rulemaking process not yet finalized — a figure that likely numbers in the hundreds. For example:

- In August 2008, the Department of Labor proposed a rule that would change the way federal regulators calculate estimates for on-the-job risks. The rule would also add an extra comment period to new worker health standards, creating unnecessary delay.

⁸ The memo is addressed to the heads of all executive branch agencies, which presumably includes independent regulatory agencies such as the Securities and Exchange Commission and the Consumer Product Safety Commission.

⁹ See [<http://frwebgate1.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=32781035761+0+2+0&WAIAction=retrieve>] for the text of this memo in the *Federal Register*.

¹⁰ See <http://www.whitehouse.gov/omb/asset.aspx?AssetId=424> for the text of the memorandum.

- In July 2008, the Justice Department proposed a rule that would expand the power of state and local law enforcement agencies to investigate potential criminal activities and report the information to federal agencies. The rule would broaden the scope of activities authorities could monitor to include organizations as well as individuals, along with non-criminal activities that are deemed "suspicious."
- In September 2008, the Mine Safety and Health Administration proposed a rule that would require mine operators to test employees in "safety-sensitive" positions (defined as, "Any type of work activity where a momentary lapse of critical concentration could result in an accident, injury, or death.") for drug and alcohol use.

The Emanuel memo provides a useful vehicle for stopping ill-advised Bush regulations that are still being worked on by agencies. This is no different than Bush's approach to dealing with Clinton's midnight regulations.

Final Regulations Not yet in Effect

The Emanuel memo allows agencies to reevaluate those Bush-era regulations that were published in the *Federal Register* as final rules but which have not yet taken effect. The memo requests agencies to:

" Consider extending for 60 days the effective date of regulations that have been published in the Federal Register but not yet taken effect...for the purpose of reviewing questions of law and policy raised by those regulations. Where such an extension is made for this purpose, you should immediately reopen the notice-and comment period for 30 days to allow interested parties to provide comments about issues of law and policy raised by those rules."

Agencies are encouraged to take "appropriate further action" if there are questions about a regulation. The complementary Orszag memo identifies eight criteria agencies may use to reconsider regulations that have not yet taken effect. For example, agencies may extend the effective dates of the regulations if they find regulations that do not meet legal muster or were not developed in an open and transparent manner.

A review of many of the Bush midnight regulations should lead to questions about the reduced comment periods, whether comments were adequately considered, and the hurried nature of the process by which the regulations were formulated. It would not be surprising to see several, perhaps many, rules withdrawn or amended substantially as a result of this review process. In fact, the eight considerations listed in the Orszag memo contain a clear enumeration of the kinds of problems this hurried process can lead to:

"(1) whether the rulemaking process was procedurally adequate; (2) whether the rule reflected proper consideration of all relevant facts; (3) whether the rule reflected due consideration of the agency's statutory or other legal obligations; (4) whether the rule is based on a reasonable judgment about the legally relevant policy considerations; (5) whether the rulemaking process was open and transparent; (6) whether objections to the rule were adequately considered, including whether interested parties had fair opportunities to present contrary facts and arguments; (7) whether interested parties had the benefit of access to the facts, data, or other analyses on which the agency relied; and (8) whether the final rule found adequate support in the rulemaking record."

Some of the final regulations not yet in effect and, therefore, covered by the Obama administration's moratorium include:

- An EPA regulation that alters the way industrial facilities count their emissions under the New Source Review program. Under the regulation, industrial facilities are not required to combine all their emissions when determining whether they meet federal emissions thresholds, if the emissions are for two or more different purposes. EPA published the regulation Jan. 15, and it is scheduled to go into effect Feb. 17.
- A Department of Agriculture (USDA) regulation that sets requirements for country-of-origin labeling on meat, seafood, and other perishable food items. The rule exempts "processed" foods, defined very broadly, from labeling requirements. USDA published the regulation Jan. 15, and it is scheduled to go into effect March 16.

The Orszag memo points agency officials to the Administrative Procedure Act which allows agencies to postpone effective dates for regulations under judicial review "when an agency finds that justice so requires."

Regulations Not Covered by the Moratorium

The Bush administration was able to finalize many regulations in time to make them effective before Bush left office. This means the Obama administration will be unable to freeze or easily stop them. Accordingly, the Emanuel memo does not directly address how to deal with troublesome Bush regulations made effective in the waning days of the last administration. The Emanuel memo also has a narrow definition of "regulation," which may mean it does not apply to other types of agency actions like guidelines or policy statements that have the effect of regulations (although not legally binding). It may be easy for OMB to send the message to agency heads that these non-regulatory policy directives are intended to be covered by the Emanuel and Orszag memos.

The Bush administration finalized dozens of regulations that drew fire from environmental, consumer, worker, and healthcare advocates. I noted several of them above and a longer list of regulations now in effect is included at the end of this testimony.

The options for delaying or overturning the Bush regulations in effect that were poorly done, violate statutory intent, or differ significantly from the policy priorities of the Obama administration are limited. The most likely option for the administration is for the agencies to conduct a new rulemaking for any rule an agency wishes to amend significantly or reverse. There are different scenarios for how a new rulemaking might proceed. If a Bush rule is generally unacceptable to the agency and yet the Obama administration wants to regulate in a particular area, the agency could treat it as an entirely new rulemaking. A new rule would likely take years to complete using the current process. The new rulemaking could be triggered by a petition for reconsideration filed by any interested person or initiated by the agency.

The agency could issue a revised rule as an interim final rule while it undertakes a new procedure to revise or replace the questionable regulation. After reviewing the process by which the rule was promulgated and the substance of the rule, the agency could issue an interpretive rule – an explanation of how the agency views the rule and the statute directing the agency to regulate. This is most likely when the agency thinks the midnight rule doesn't need a complete overhaul.

Another approach for undoing troublesome Bush administration regulations is through the courts. Since many of the midnight regulations are controversial, court challenges have been, or will be, lodged against rules. The Orszag memo opens the door for expedited court settlements on both final regulations not yet in effect and final regulations in effect if suits have been filed challenging the rules before the effective date.

A court ruling invalidating one of Bush's midnight regulations would give agencies two options: kill the regulation and do nothing more, or issue a notice and comment for a new (or revised) regulation substantially different from the Bush rule. Of course, a court may choose to invalidate the Bush rule and instruct the agency to continue using the rule in existence prior to the Bush regulation. The Orszag memo reminds agencies that they may choose not to defend Bush-era regulations – both effective and not effective – in court. The memo states, "In special cases ... you may consider the appropriateness of not defending a legally doubtful rule in the face of a judicial challenge."

Congressional action

Congress may also take action to stop midnight regulations. First, Congress could disapprove regulations on a case-by-case basis using the Congressional Review Act (CRA). Our current political circumstances, with an incoming president and a new Congress of the same party, make the use of the CRA a more realistic option than in other circumstances. This option, which affords an expedited, non-amendable, non-filibusterable procedure in Congress, is much faster than regular legislative processes or even proceeding with a new rulemaking. Congress would have to propose and pass a resolution of disapproval for each rule it wishes to contest, however. The CRA has only been used once successfully and is perceived to come with great political cost in using it. Thus, the time it would take to do many rules and the political cost associated with this option would likely be a great distraction from other significant issues Congress and the administration may want to address. Moreover, if Congress was to employ the CRA to stop certain rules, it may still leave the agency with the need to do a rulemaking since the agency may need a regulation to implement its statutory responsibilities.

Second, Congress could also use other legislative vehicles, such as free-standing legislation or amendments to authorizing legislation, to overturn the rule. Unlike the CRA procedures which forbid a filibuster in the Senate, the proposed legislation would be subject to a filibuster and amendments.

Third, Congress could seek structural reforms that prevent or limit the promulgation of rules in the manner that typifies the midnight regulation phenomenon. The reforms would require careful constitutional analysis to avoid a direct separation of powers confrontation with the executive branch similar to the confrontation with the Bush administration over its view of the expansive powers of a unitary executive. An example of a structural reform bill is Rep. Jerrod Nadler's (D-NY) Midnight Rule Act (H.R. 34), introduced Jan. 6, that would prevent midnight rules from going into effect until 90 days after a new agency head has been appointed. This extension of the effective date would allow the agencies time for review of midnight rules.

Fourth, Congress may wish to withhold funding for the implementation of some or all parts of a midnight regulation. While this may be attractive it raises several concerns. First, withholding funding for implementation of a rule is not the same as killing the rule. Some rules are self-enforcing. Second, withholding funding does not allow the agency to move forward with a proper regulation (unless, Congress allows the agency to proceed with a notice and comment rulemaking). Finally, withholding funding would have to be done year after year.

All of these options need careful consideration of the regulatory standards that would result from any action. In some situations, reversing a Bush midnight regulation could result in having no regulatory standard when a weak standard would be better than none; in other instances, it could result in the former standard being reinstated. Action on each rule requires careful consideration.

The bottom line is that there is no one-size-fits-all solution to the troubling Bush regulations that are now effective. Instead, a careful review of each regulation and application of the appropriate strategy will need to be employed. Without question, Congress and the Obama administration will need to be coordinated on this effort.

| Appendix | | | |
|--|---|----------------------------------|-----------------------|
| Troublesome Midnight Regulations Published Since October 1, 2008 | | | |
| Regulation Agency | Description | Publication of final rule | Effective date |
| Country-of-origin labeling Agricultural Marketing Service ¹ | The rule established country-of-origin labeling requirements for beef, lamb, chicken, goat, pork, fish and shellfish, certain nuts, and other perishable agricultural commodities. However, an overly broad definition of "processed foods" could exempt "over 60 percent of pork, the majority of frozen vegetables, an estimated 95 percent of peanuts, pecans, and macadamia nuts, and multi-ingredient fresh produce items such as fruit salads and salad mixes" from the labeling requirements, according to Wenonah Hauter, Executive Director of Food and Water Watch. | 1/15/2009 | 3/16/2009 |
| Partner Vetting System U.S. Agency for International Development ² | The rule creates the Partner Vetting System (PVS) which would screen charities, and their "principle" employees, who receive or apply for USAID funding for possible ties to terrorists. The government would then screen these employee names against classified databases (USAID will not specify which databases) that has information on terrorists. The rule also states, "The decision as to whether to implement PVS will be made by the incoming Obama Administration." | 1/2/2009 | 2/2/2009 |
| Pledge requirements for HIV/AIDS grantees Department of Health and Human Services ³ | The rule requires HIV/AIDS grantees to choose between adopting government policy (explicitly and unequivocally opposing prostitution and sex trafficking) for their entire organizations or setting up completely separate affiliated organizations. However, the degree of separation proposed is so severe that it is impractical to implement. | 12/24/2008 | 1/20/2009 |
| Exemption of information reporting for federal contractors Wage and Hour Division ⁴ | The rule exempts contractors covered by the Davis-Bacon Act and the Copeland Anti-Kickback Act from including in weekly payroll record reports to the federal government the social security numbers and home addresses of workers. This will make it more difficult for the government to verify the accuracy of reports. | 12/19/2008 | 1/18/2009 |
| Privatization of public toll roads Federal Highway Administration ⁵ | The rule could lead to an increase in the privatization of public toll roads by forcing states to accept bids from private companies when reorganizing or transferring authority for operating toll roads. | 12/19/2008 | 1/18/2009 |

| Appendix (continued) | | | |
|---|---|----------------------------------|-----------------------|
| Regulation Agency | Description | Publication of final rule | Effective date |
| Access to reproductive health services Department of Health and Human Services ⁶ | The rule could limit women's access to reproductive health services. The rule requires health care providers to certify they will allow their employees to withhold services on the basis of religious or moral grounds or risk losing federal funding. | 12/19/2008 | 1/20/2009 |
| Certification for the Employment of H-2B Aliens Employment and Training Administration ⁷ | The rule eliminates the requirement that the government certify employers' compliance with H-2B program requirements, instead allowing for self attestation. | 12/19/2008 | 1/18/2009 |
| Burning of hazardous waste Environmental Protection Agency ⁸ | The rule reclassifies thousands of tons of hazardous waste as fuel, allowing it to be burned instead of sensitively disposed of. The emissions generated by burning the waste would be more toxic than emissions from burning fossil fuels. | 12/19/2008 | 1/20/2009 |
| Revisions to the H-2A guestworker program Employment and Training Administration ⁹ | The rule weakens wage protections and housing standards for agricultural workers. The rule could also allow employers to hire more foreign workers without giving due consideration to U.S. workers. | 12/18/2008 | 1/17/2009 |
| Air pollution reporting from farms Environmental Protection Agency ¹⁰ | The rule exempts factory farms from reporting air pollution emissions coming from animal waste. | 12/18/2008 | 1/20/2009 |
| Endangered species consultation Fish and Wildlife Service/National Oceanic and Atmospheric Administration ¹¹ | The rule alters implementation of the Endangered Species Act by allowing federal land-use managers to approve projects like infrastructure creation, minerals extraction, or logging without consulting federal habitat managers and biological health experts responsible for species protection. Consistent with consultation had been required. The rule also forbids global warming from being considered as a factor in species decisions. | 12/16/2008 | 1/15/2009 |
| Mountaintop mining Office of Surface Mining ¹² | The rule allows mining companies to dump the waste, or spoil, from mountaintop mining into rivers and streams. | 12/12/2008 | 1/12/2009 |
| Gun safety in national parks National Park Service ¹³ | The rule lifts the 25-year-old ban on carrying loaded weapons in national parks. | 12/10/2008 | 1/9/2009 |
| Vertical tandem lifts Occupational Safety and Health Administration ¹⁴ | The rule allows maritime port operators to lift two or more empty containers secured together at the same time. | 12/10/2008 | 4/9/2009 |

Appendix (continued)

| Regulation Agency | Description | Publication of final rule | Effective date |
|--|---|------------------------------|-------------------|
| Emergency land withdrawals Bureau of Land Management ¹⁵ | The rule removes existing regulations that provide for emergency land withdrawals. Specifically, the rule change revokes Congress's authority to require the agency to bar land from being developed in emergency situations. The rulemaking is largely in response to a June 25th Congressional Resolution which ordered BLM to immediately remove public lands adjacent to the Grand Canyon from uranium mining claims. | 12/5/2008 | 1/5/2009 |
| Rerouting hazmat rail shipments Pipeline and Hazardous Materials Safety Administration ¹⁶ | The rule requires railcars carrying hazardous materials to reroute around densely populated areas; but it gives control of rerouting to the railroad industry without federal oversight or local input. | 11/26/2008 | 12/26/2008 |
| Rail transportation security Transportation Security Administration ¹⁷ | The rule requires railcars carrying hazardous materials to reroute around densely populated areas; but it would give control of rerouting to the railroad industry without federal oversight or local input. | 11/26/2008 | 12/26/2008 |
| Runoff from factory farms Environmental Protection Agency ¹⁸ | The rule could allow the runoff from concentrated animal feeding operations, i.e. factory farms, to pollute waterways without a permit. The rule circumvents the Clean Water Act, instead allowing for self-regulation. | 11/20/2008 | 12/22/2008 |
| Truck driver hours of service Federal Motor Carrier Safety Administration ¹⁹ | The rule allows truck drivers to drive up to 11 consecutive hours and shortens mandatory rest times between work weeks. It is nearly identical to a regulation struck down in the D.C. Court of Appeals in 2007. | 11/19/2008 | 1/19/2009 |
| Oil shale development Bureau of Land Management ²⁰ | Capitalizing on a recent decision by Congress to let the ban on oil shale development to expire, the BLM rule opens 2 million acres of western land to leasing. Environmentalists say oil shale development, which involves extracting liquid oil from solid rock by heating it, increases greenhouse gas emissions and requires intensive water use. | 11/18/2008 | 1/17/2009 |
| Family and medical leave Wage and Hour Division ²¹ | The rule limits employee access to family and medical leave. Among other things, the rule makes it more difficult for workers to use paid vacation or personal time to take leave and allows employers to speak directly to an employee's health care provider. The rule also expands leave opportunities for military families. | 11/17/2008 | 1/16/2009 |

| Appendix (continued) | | | |
|--|--|----------------------------------|-----------------------|
| Regulation Agency | Description | Publication of final rule | Effective date |
| Medicaid outpatient services Centers for Medicare and Medicaid Services ²² | The rule narrows the definition of outpatient hospital services to reduce Medicaid beneficiaries' access to those services, such as dental and vision care. | 11/7/2008 | 12/8/2008 |
| Definition of solid waste Environmental Protection Agency ²³ | The rule guts standards for the recycling of hazardous wastes under the Resource Conservation and Recovery Act (RCRA). "In this proposed rulemaking, EPA clings to a concept of 'discard' that would exclude from regulation, by their own estimation, over 3 billion pounds of hazardous waste from over 4600 facilities in 530 industries," according to comments submitted by the Sierra Club, U.S. Public Interest Research Group, National Environmental Trust, and Safe Food and Fertilizer. | 10/30/2008 | 12/29/2008 |
| Employment verification by social security records Department of Homeland Security ²⁴ | The supplemental to a 2007 final rule instructs employers how to respond to a "no-match" letter from the Social Security Administration indicating that an employee's name and social security number do not match SSA records. But as is often the case, a no-match letter could be triggered by a database error, such as a misspelled name, and does not necessarily mean a person is an illegal immigrant. "Because many employers mistakenly assume that the letter provides information about the immigration status of the individual workers named in it, they immediately fire, lay-off, or demote such workers without giving them a chance to correct discrepancies," according to the National Immigration Law Center. | 10/28/2008 | 10/28/2008 |
| Union annual reports for trusts Office of Labor-Management Standards ²⁵ | The rule imposes new trust reporting requirement that is more onerous than requirement adopted in 2006. Treats employer contributions as equivalent of union contributions without explanation. The rule, meant to replace a rule vacated in federal court in July 2007, is widely seen as a political effort to overload labor unions with paperwork. | 10/2/2008 | 12/31/2008 |

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- ² "Privacy Act of 1974, Implementation of Exemptions," U.S. Agency for International Development, 74 FR 9. Available at: <http://edocket.access.gpo.gov/2009/pdf/E8-31131.pdf>.
- ³ "Office of Global Health Affairs; Regulation on the Organizational Integrity of Entities that are Implementing Programs and Activities Under the Leadership Act," Department of Health and Human Services, 73 FR 78997. Available at: <http://edocket.access.gpo.gov/2008/pdf/E8-30686.pdf>.
- ⁴ "Protecting the Privacy of Workers: Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction," U.S. Department of Labor, Wage and Hour Division, 73 FR 77504. Available at: <http://edocket.access.gpo.gov/2008/pdf/E8-29886.pdf>.
- ⁵ "Fair Market Value and Design-Build Amendments," U.S. Department of Transportation Federal Highway Administration, 73 FR 77495. Available at: <http://edocket.access.gpo.gov/2008/pdf/E8-30147.pdf>.
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- ⁸ "Expansion of RCRA Comparable Fuel Exclusion," U.S. Environmental Protection Agency, 73 FR 77954. Available at: <http://edocket.access.gpo.gov/2008/pdf/E8-29956.pdf>.
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