Statement of Curtis W. Copeland
Specialist in American National Government
Congressional Research Service

Before

The Committee on the Judiciary
Subcommittee on Commercial and Administrative Law
House of Representatives

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on

"Midnight Rulemaking"

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss "midnight rulemaking." As has been well documented elsewhere, at the end of every recent presidential administration (particularly those involving a change in the party controlling the White House), the level of rulemaking activity by federal agencies tends to increase — whether measured in terms of total rules, final rules, or pages in the *Federal Register*.[1] Among those who have written about this phenomenon is Susan Dudley, who was until recently the administrator of the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB). In 2001, while a senior research fellow at the Mercatus Center, she said that the sharp increase in regulatory output at the end of the Clinton Administration was "not an anomaly," and that "sudden bursts of regulatory activity at the end of a presidential

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[1] See, for example, Jerry Brito and Veronique de Rugy, "Midnight Regulations and Regulatory Review," Working Paper No. 08-34, Mercatus Center, George Mason University, available at [http://www.mercatus.org/uploadedFiles/Mercatus/Publications/Midnight%20Regulations.pdf]; and Jay Cochran, III, *The Cinderella Constraint: Why Regulations Increase Significantly During Post-Election Quarters* (Arlington, VA: Mercatus Center, Oct. 5, 2000). See also Anne Joseph O'Connell, *Cleaning Up and Launching Ahead*, January 2009, available at [http://www.americanprogress.org/issues/2009/01/cleaning_up.html].

administration are systematic, significant, and cut across party lines."[2] Midnight rulemaking has been described by some as a normal human response to approaching deadlines, and by others as an intentional effort to hamper a subsequent presidential administration.[3] Whatever the motivation, because it is difficult to change or eliminate rules once they have gone into effect, doing so at the end of a presidency is, as one observer said, "a way for an administration to have life after death."[4]

Midnight Rules at the End of the Bush Administration

Recognizing the tendency to issue "midnight rules" at the end of a presidency, on May 9, 2008, Joshua B. Bolten, then White House Chief of Staff in the George W. Bush Administration, issued a memorandum to the heads of executive departments and agencies stating that, except for "extraordinary circumstances, regulations to be finalized in this Administration should be proposed no later than June 1, 2008, and final regulations should be issued no later than November 1, 2008." The memorandum also said the administrator of OIRA would "coordinate an effort to complete Administration priorities in this final year," and that the OIRA administrator would "report on a regular basis regarding agency compliance with this memorandum."[5]

Despite this effort, and statements from the White House notwithstanding,[6] the number of rules that federal agencies promulgated in the final months of the Bush Administration increased noticeably. One indication of this increase is the number of major final rules that were sent to the Government Accountability Office (GAO) pursuant to requirements in the Congressional Review Act (CRA, 5 U.S.C. §§ 801-808).[7] The CRA requires GAO to provide Congress with a report on each final rule that OIRA designates as a "major" rule (e.g., rules with at least a $100 million impact on the economy) within 15 calendar days of

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[2] Susan E. Dudley, "Reversing Midnight Regulations," *Regulation*, Spring 2001, p. 9.

[3] Dean Scott, "Public Policy Groups Suggest Strategies for Obama to Reverse 'Midnight' Regulations," *BNA Daily Report for Executives*, January 23, 2009, p. A-23.

[4] John M. Broder, "A Legacy Bush Can Control," *New York Times*, September 9, 2007, p. A1, quoting Phillip Clapp, president of the National Environmental Trust.

[5] Under Executive Order 12866, OIRA reviews all significant rules before they are published in the *Federal Register*, and is the President's chief representative in the rulemaking process. See CRS Report RL32397, *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs*, by Curtis W. Copeland.

[6] See Ralph Lindeman, "White House Denies Effort to Issue Last-Minute Pro-Business Regulations, *BNA Daily Report for Executives*, November 3, 2008, p. A-15, in which deputy White House press secretary Tony Fratto denied there had been an increase in rulemaking activity. Specifically, he said "We're not doing that in this administration." His comments were made in response to a report by R. Jeffrey Smith, "A Last Push to Deregulate; White House to Ease Many Rules," *Washington Post*, October 31, 2008, p. A1.

[7] The Congressional Review Act (in 5 U.S.C. § 801(a)(1)(A)) requires all final rules to be sent to each house of Congress and GAO before they can take effect.

the rule being sent to GAO and Congress.[8] During the first six months of 2008, the agencies sent GAO a total of 32 major final rules, but in the second six months, the agencies sent GAO 53 rules — a 65% increase. The number of major rules in the second six months of 2008 was also higher than the number in the second six months of 2007 (53 major rules in 2008 compared with 41 major rules in 2007 — a 29% increase). The biggest differences between 2007 and 2008 were in the months of October and November. In 2007, federal agencies submitted 13 major rules to GAO in October and November, but in the same two months in 2008, the agencies submitted 30 major rules — a 131% increase.

The surge in rulemaking at the end of the Bush Administration is also apparent in the number of "significant" rules that OIRA reviewed pursuant to Executive Order 12866.[9] According to the Regulatory Information Service Center, from September 1, 2008, through December 31, 2008, OIRA reviewed a total of 190 significant final rules — a 102% increase when compared to the same period in 2007 (94 rules).[10]

Rules Attracting Controversy

Several Members of Congress and others have expressed concerns about some of the final rules that were published in the final months of the Bush Administration, and some have called for President Obama or Congress to reverse those rules.[11] Final rules that have been identified as problematic include:

- a Department of the Interior (DOI) rule that, in the words of the proposal, requires that surface coal mining operations "minimize the creation of excess spoil and the adverse environmental impacts of fills," but that some

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[8] 5 U.S.C. § 801(a)(2)(A).

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

[10] See [http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init] to access this database.

[11] For example, the Chairman of the House Select Committee on Energy Independence and Global Warming released a report on October 31, 2008, listing a number of rules that the majority staff considered problematic. To view a copy of this report and related information, see [http://globalwarming.house.gov/mediacenter/pressreleases_2008?id=0056]. The same day, the Speaker of the House issued a list of "ghoulish midnight regulations" being issued by the Bush Administration. To view a copy of this list, see [http://www.speaker.gov/blog/?p=1567]. On November 3, 2008, OMB Watch published a list of "controversial rules worth watching." To view this list, see [www.ombwatch.org/article/blogs/entry/5494]. See also Cindy Skrzycki, "Democrats Eye Bush Midnight Regulations," *Washington Post*, November 11, 2008, p. D3.

observers have said would allow deposits of waste mountaintop material within 100 feet of certain streams.[12]

- a DOI rule that would, among other things, give federal agencies greater responsibility in determining when and how their actions may affect species under the Endangered Species Act.[13] Several Members of Congress have expressed concerns about the draft rule, and congressional hearings are expected.

- a DOI rule that permits state laws to determine whether concealed firearms can be carried in national parks.[14]

- an Environmental Protection Agency (EPA) revision of the definition of "solid waste" that would exclude certain types of sludge and byproducts from regulation under the Resource Conservation and Recovery Act.[15]

- a rule issued by the Department of the Treasury and the Board of Governors of the Federal Reserve System implementing certain provisions of the Unlawful Internet Gambling Enforcement Act of 2006.[16]

All of these final rules had taken effect by the time President Bush left office on January 20, 2009. Other rules that had been described by some observers as troublesome (1) had been published in the *Federal Register* as final rules, but had not taken effect; or (2) had not been published as final rules. As discussed in detail in the remainder of this testimony, various options are available to both a new President and Congress to delay or prevent the implementation of regulations viewed as problematic, or to eliminate them entirely. Which strategy is most effective for a particular rule depends on how far that rule has progressed in the federal rulemaking process.

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[12] U.S. Department of the Interior, Office of Surface Mining Reclamation and Enforcement, "Excess Spoil, Coal Mine Waste, and Buffers for Waters of the United States," 73 *Federal Register* 75814, December 5, 2008. The rule took effect on January 12, 2009.

[13] U.S. Department of the Interior, Fish and Wildlife Service, and U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, "Interagency Cooperation Under the Endangered Species Act," 73 *Federal Register* 76272, December 16, 2008. This rule took effect on January 15, 2009. For more detailed information about this rule, see CRS Report RL34641, *Proposed Changes to Regulations Governing Consultation Under the Endangered Species Act (ESA)*, by Kristina Alexander and M. Lynne Corn.

[14] U.S. Department of the Interior, National Park Service, "General Regulations for Areas Administered by the National Park Service and the Fish and Wildlife Service," 73 *Federal Register* 74966, December 12, 2008. This rule took effect on January 9, 2009.

[15] U.S. Environmental Protection Agency, "Revisions to the Definition of Solid Waste," 73 *Federal Register* 64668, October 30, 2008. The rule took effect on December 29, 2008.

[16] U.S. Department of the Treasury and the Board of Governors of the Federal Reserve System, "Prohibition on Funding of Unlawful Internet Gambling", 73 *Federal Register* 69382, November 18, 2008. The rule took effect on January 19, 2009, but compliance was not required until December 1, 2009.

Presidential Options

One approach that recent Presidents have used to control "midnight rulemaking" at the start of their administrations has been the imposition of a moratorium on new regulations by executive departments and independent agencies, sometimes accompanied by a requirement that the departments and agencies postpone the effective dates of certain rules issued at the end of the previous President's term.[17] Also, any proposed rules that have not been published in the *Federal Register* as final rules by the time the outgoing President leaves office can be withdrawn by a new administration. However, once final rules have been published in the *Federal Register*, the only way for a new administration to eliminate or change the rules (even just changing the effective date) is by going back through the rulemaking process.

Regulatory Moratoriums and Postponements

On January 29, 1981, shortly after taking office, President Reagan issued a memorandum to the heads of the Cabinet departments and the EPA Administrator directing them to take certain actions that would give the new administration time to implement a "new regulatory oversight process," particularly for "last-minute decisions" made by the outgoing Carter Administration. Specifically, the memorandum said that agencies should, to the extent permitted by law, (1) postpone for 60 days the effective date of all final rules that were scheduled to take effect during the next 60 days, and (2) refrain from promulgating any new final rules. Executive Order 12291, issued a few weeks later, contained another moratorium on rulemaking that supplemented, but did not supplant, the January 29, 1981, memorandum.[18] Section 7 of the executive order directed agencies to "suspend or postpone the effective dates of all major rules that they have promulgated in final form as of the date of this Order, but that have not yet become effective." Excluded were major rules that could not be legally postponed or suspended, and those that ought to become effective "for good cause." Agencies were also directed to refrain from promulgating any new final rules until a final regulatory impact analysis had been conducted.

On January 22, 1993, Leon E. Panetta, the Director of OMB for the incoming Clinton Administration, sent a memorandum to the heads and acting heads of Cabinet departments and independent agencies requesting them to (1) not send proposed or final rules to the Office of the Federal Register for publication until they had been approved by an agency head appointed by President Clinton and confirmed by the Senate, and (2) withdraw from the Office of the Federal Register all regulations that had not been published in the *Federal Register* and that could be withdrawn under existing procedures. The requirements did not apply, however, to any rules that had to be issued immediately because of a statutory or judicial deadline. The OMB Director said these actions were needed because it was "important that President Clinton's appointees have an opportunity to review and approve new regulations."

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[17] All of these presidential moratoriums on rulemaking have generally exempted regulations issued by independent regulatory boards and commissions, as well as regulations issued in response to emergency situations or statutory or judicial deadlines.

[18] Executive Order 12291, "Federal Regulation," 46 *Federal Register* 13193, February 17, 1981.

On January 20, 2001, Andrew H. Card, Jr., Assistant to President George W. Bush and Chief of Staff, sent a memorandum to the heads and acting heads of all executive departments and agencies generally directing them to (1) not send proposed or final rules to the Office of the Federal Register, (2) withdraw from the Office rules that had not yet been published in the *Federal Register*, and (3) postpone for 60 days the effective date of rules that had been published but had not yet taken effect.[19] The Card memorandum instructed agencies to exclude any rules promulgated pursuant to statutory or judicial deadlines, and to notify the OMB Director of any rules that should be excluded because they "impact critical health and safety functions of the agency." The memorandum indicated that these actions were needed to "ensure that the President's appointees have the opportunity to review any new or pending regulations."

Effects of the Card Memorandum. In February 2002, GAO reported on the delay of effective dates of final rules subject to the Card memorandum.[20] GAO indicated that 371 final rules were subject to this aspect of the Card memorandum, and federal agencies delayed the effective dates of at least 90 of them. As of the one-year anniversary of the Card memorandum, most of the 90 rules had taken effect, but one had been withdrawn and not replaced by a new rule, three had been withdrawn and replaced by new rules, and nine others had been altered (e.g., with a different implementation date or different reporting requirements). While some agencies allowed the public to comment on the extensions of the effective dates, most agencies simply published final rules citing the Administrative Procedure Act's "good cause" or "procedural rule" exceptions to notice and comment rulemaking.[21] One author noted that such practices "tended to evade judicial challenge due to their short time frames, but they did occasion criticism."[22]

The Bolten Memorandum. Viewed in this context, the May 2008 memorandum by White House Chief of Staff Bolten represents both a continuation of a trend of presidential involvement in rulemaking related to transitions, and an evolution in that involvement. The Administrative Procedure Act generally prohibits final rules from taking effect for 30 days

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[19] U.S. White House Office, "Regulatory Review Plan," *Federal Register*, vol. 66, no. 16, January 24, 2001, p. 7702. To view a copy of this memorandum, see [http://www.whitehouse.gov/omb/inforeg/regreview_plan.pdf].

[20] General Accounting Office, *Regulatory Review: Delay of Effective Dates of Final Rules Subject to the Administration's Jan. 20, 2001, Memorandum*, GAO-02-370R, February 15, 2002.

[21] As discussed later in this testimony, the Administrative Procedure Act allows an agency to avoid notice and comment procedures for rules of agency organization, procedure, or practice when an agency finds, for "good cause," that those procedures are "impracticable, unnecessary, or contrary to the public interest."

[22] Jeffrey S. Lubbers, ed., *A Guide to Federal Agency Rulemaking, Fourth Edition* (Chicago: ABA Publishing, 2006), pp. 121-122. For a discussion of these criticisms, see William M. Jack, "Taking Care That Presidential Oversight of the Regulatory Process is Faithfully Executed: A Review of Rule Withdrawals and Rule Suspensions Under the Bush Administration's Card Memorandum," *Administrative Law Review*, vol. 54 (Fall 2002), pp. 1479-1518. Some federal courts have considered any delay in a rule's effective date to require notice and comment rulemaking. See *Natural Resources Defense Council, Inc. v. EPA*, 683 F.2d 752, 761 (3d Cir. 1982); and *Council of the Southern Mountains v. Donovan*, 653 F.2d 573 (D.C. Cir. 1981). One such action pursuant to the Card memorandum was rejected by a court. See *Natural Resources Defense Council v. Abraham*, 355 F.3d 179, 204-05 (2d Cir. 2004).

after they are promulgated,[23] and the Congressional Review Act generally prohibits "major" rules from taking effect for 60 days after they are published or sent to Congress.[24] Therefore, because the Bolten memorandum required that all final rules be published in the *Federal Register* by November 1, 2008, full compliance with this requirement would result in all rules having taken effect before President Obama took office on January 20, 2009. Some observers have noted that this approach was quite effective, as many of the controversial final rules that were issued at the end of the Bush Administration had taken effect by the time President Obama took office.[25] In contrast, many rules that were issued at the end of the Clinton Administration had not taken effect.[26]

The Emanuel and Orszag Memoranda. On January 20, 2009, Rahm Emanuel, Assistant to President Obama and Chief of Staff, sent a memorandum to the heads of executive departments and agencies requesting that they generally (1) not send proposed or final rules to the Office of the Federal Register, (2) withdraw from the Office rules that had not yet been published in the *Federal Register*, and (3) "consider" postponing for 60 days the effective dates of rules that had been published in the *Federal Register* but had not yet taken effect.[27] The Director or Acting Director of OMB was allowed to except certain rules from these requirements for emergency or "other urgent circumstances relating to health, safety, environmental, financial, or national security matters." One of the major differences between the Emanuel memorandum and the Card memorandum is in the degree of deference shown to the rulemaking agencies. For example, whereas the Emanuel memorandum requested agencies to "consider" extending the effective dates of rules that had not taken effect, the Card memorandum simply instructed the agencies to do so. Also, the Emanuel memorandum said that when the effective dates of rules are extended, the agencies should allow interested parties to comment for 30 days "about issues of law and policy raised by those rules." The Card memorandum had no similar provision regarding public comment.

On January 21, 2009, Peter R. Orszag, Director of the Office of Management and Budget, sent a memorandum to the heads of executive departments and agencies providing guidance on implementing the third provision in the Emanuel memorandum.[28] The Orszag memorandum said that agencies' decisions on whether to extend the effective dates of rules should be based on such considerations as whether the rulemaking process was procedurally adequate, whether the rule reflected proper consideration of all relevant facts, and whether objections to the rule were adequately considered. The Orszag memorandum also said that public comments were to be sought regarding both the agencies' "contemplated extension

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[23] 5 U.S.C. 553(d).

[24] 5 U.S.C. 801(a)(3).

[25] Reece Rushing, Rick Melberth, and Matt Madia, *After Midnight: The Bush Legacy of Deregulation and What Obama Can Do*, Center for American Progress and OMB Watch, available at [http://www.americanprogress.org/issues/2009/01/after_midnight.html].

[26] For example, according to GAO, federal agencies submitted 385 rules to GAO between January 1, 2001, and January 20, 2001, including 12 major rules. In contrast, during the same period of time at the end of the George W. Bush Administration (between January 1, 2009, and January 20, 2009), federal agencies submitted only 138 rules, and only one major rule.

[27] Executive Office of the President, "Memorandum for the Heads of Executive Departments and Agencies," 74 *Federal Register*, 4435, January 26, 2009.

[28] See [http://ombwatch.org/regs/PDFs/OrszagMemo09-08.pdf] for a copy of this memorandum.

of the effective date and the rule in question." Agencies were also instructed to consult with OIRA and the Department of Justice's Office of Legal Counsel before extending the effective dates of any rules, particularly when the rules were scheduled to take effect before public comments could be solicited.

Although many of the controversial rules that were issued near the end of the Bush Administration had taken effect by January 20, 2001, the Emanuel memorandum has caused the effective dates of some rules to be delayed. For example, last week, the Forest Service published a final rule in the *Federal Register* delaying the effective date of a December 29, 2009, final rule regulating the sale of certain forest products.[29] The agency said the January 28, 2009, effective date was being delayed for 60 days in accordance with the Emanuel memorandum, and solicited public comments for 30 days on "any issues or concerns on the policy raised by the December rule." In addition, federal agencies have withdrawn a number of rules that had been sent to the Office of the Federal Register but had not been published.

Proposed Rules That Have Not Been Published as Final Rules

If a federal agency has published a proposed rule, but has not published the related final rule, the agency is under no obligation to issue a final rule unless required to do so by statute or court order. To preclude further action on a proposed rule, the agency may wish to publish a notice in the *Federal Register* announcing its withdrawal of the rule.[30] Alternatively, the agency could elect to publish the final rule, solicit additional public comments on the proposed rule, or take some other action.

Several Bush Administration proposed rules that were of concern to certain interested parties were never published as final rules. These rules include:

- a Department of Justice proposed rule that would "clarify and update" the policies governing criminal intelligence systems that receive federal funding, but that some contend would make it easier for state and local police to collect, share, and retain sensitive information about Americans, even when no underlying crime is suspected.[31]

- a Department of Labor proposed rule that would change the way that occupational health risk assessments are conducted within the department. Legislation was introduced in the 110th Congress (H.R. 6660 and S. 3566)

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[29] U.S. Department of Agriculture, Forest Service, "Sale and Disposal of National Forest System Timber; Special Forest Products and Forest Botanical Products," 74 *Federal Register* 5107, January 29, 2009.

[30] These withdrawals are recorded in the *Unified Agenda of Federal Regulatory and Deregulatory Actions*, which is published twice a year by the Regulatory Information Service Center within the General Services Administration.

[31] For the proposed rule, see U.S. Department of Justice, Office of Justice Programs, "Criminal Intelligence Systems Operating Procedures," 73 *Federal Register* 44673, July 31, 2008. For a characterization of the rule, see Spencer S. Hsu and Carrie Johnson, "U.S. May Ease Police Spy Rules," *Washington Post*, August 16, 2008, p. A1.

to prohibit the issuance or enforcement of this rule, but the legislation was not enacted.[32]

- an EPA "new source review" rule that, if made final, would alter current requirements stipulating when upgrades at older power plants would require the installation of modern anti-pollution equipment.[33] EPA said that the change would balance environmental protection with the "economic need of sources to use existing physical and operating capacity." However, environmental groups contended that the change would weaken existing protections and conflicts with a recent decision of the Supreme Court related to this issue.[34]

New Rulemaking to Eliminate or Change Final Rules

Once an outgoing administration's final rule has been published in the *Federal Register*, the only way for the incoming administration to change or eliminate the rule is by going back through the federal rulemaking process.[35] Under informal rulemaking procedures established by the Administrative Procedure Act (APA, 5 U.S.C. § 551 et seq.), agencies are generally required to publish a notice of proposed rulemaking (NPRM) in the *Federal Register*, allow "interested persons" an opportunity to comment on the proposed rule, and, after considering those comments, publish the final rule along with a general statement of its basis and

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[32] For the proposed rule, see U.S. Department of Labor, Office of the Secretary, "Requirements for DOL Agencies' Assessment of Occupational Health Risks," 73 *Federal Register* 50909, August 29, 2008. For characterizations of the rule, see Carol D. Leonnig, "U.S. Rushes to Change Workplace Toxin Rules," *Washington Post*, July 23, 2008, p. A1; and Gayle Cinquegrani, "Miller Introduces House Bill to Prohibit DOL 'Secret Rule' on Workplace Toxin Exposure," *BNA Daily Report for Executives*, August 1, 2008, p. A-7. On August 18, 2008, a *Washington Post* editorial recommended that the Department of Labor withdraw its proposed rule ("A Toxic Proposal: The Labor Department Politicizes a Regulation of Workplace Health," *Washington Post*, August 18, 2008, p. A10).

[33] For the proposed rule, see U.S. Environmental Protection Agency, "Supplemental Notice of Proposed Rulemaking for Prevention of Significant Deterioration and Nonattainment New Source Review: Emission Increases for Electric Generating Units," 72 *Federal Register* 26201, May 8, 2007.

[34] American Lung Association, EarthJustice, Environmental Defense, Natural Resources Defense Council, and Sierra Club; "Comments on EPA's Proposed 'Supplemental Notice of Proposed Rulemaking for Prevention of Significant Deterioration and Nonattainment New Source Review: Emission Increases for Electric Generating Units,'" available at [http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=090000648 0273d62].

[35] Advocates of the "unitary executive" theory of presidential power assert that the President should be able to make the final decision regarding the substance of agency rules — even when Congress has assigned rulemaking responsibilities to agency officials. Even in those instances, however, it is the agency that must take the rulemaking action, not the President. The President cannot unilaterally eliminate or change a rule issued by an executive agency (e.g., by issuing an executive order), but advocates of the unitary executive and others assert that the President can generally direct an agency official to do so. For more on this issue, see testimony of Curtis W. Copeland, Specialist in American National Government, U.S. Congress, House Committee on the Judiciary, *Federal Rulemaking and the Unitary Executive Principle*, hearings, 110th Congress, 2nd sess., May 6, 2008 (available from the author).

purpose. The APA does not specify how long rules must be available for comment, but agencies commonly allow at least 30 days. As noted previously, the APA says that the final rule generally cannot become effective until at least 30 days after its publication.

However, there are ways that the rulemaking process can be shortened. The APA (5 U.S.C. § 553) states that full "notice and comment" procedures are not required when an agency finds, for "good cause," that those procedures are "impracticable, unnecessary, or contrary to the public interest." Agencies can also make their rules take effect in less than 30 days by invoking the "good cause" exception.[36] When agencies use the good cause exception, the APA requires that they explicitly say so and provide a rationale for the exception's use when the rule is published in the *Federal Register*. The APA also provides explicit exceptions to the NPRM requirement for certain categories of regulatory actions, such as rules dealing with military or foreign affairs; agency management or personnel; or public property, loans, grants, benefits, or contracts. Further, the APA says that the NPRM requirements do not apply to interpretative rules; general statements of policy; or rules of agency organization, procedure, or practice.

Certain procedures for expedited rulemaking were designed not to involve NPRMs. One such procedure is what is known as "interim final" rulemaking, in which an agency issues a final rule without an NPRM that is generally effective immediately, but with a post-promulgation opportunity for the public to comment. If the public comments persuade the agency that changes are needed in the interim final rule, the agency may revise the rule by publishing a final rule reflecting those changes. Interim final rulemaking can be viewed as a particular application of the good cause exception in the APA, but with the addition of a comment period after the rule has become effective.[37]

The legislative history of the APA makes it clear that Congress did not believe that the act's good cause exception to the notice and comment requirements should be an "escape clause."[38] A federal agency's invocation of the good cause exception (or other exceptions to notice and comment procedures) is subject to judicial review. After having reviewed the totality of circumstances, the courts can determine that an agency's reliance on the good cause exception was not authorized under the APA.[39] The case law has generally reinforced the view that the good cause exception should be "narrowly construed."[40] Nevertheless,

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[36] The APA also allows rules to take effect in less than 30 days if the rule grants or recognizes an exemption or relieves a restriction, or if the rule is an interpretative rule or statement of policy.

[37] For more, see Michael Asimow, "Interim Final Rules: Making Haste Slowly," *Administrative Law Review*, 51 (Summer 1999), pp. 703-755.

[38] Senate Committee on the Judiciary, *Administrative Procedure Act: Legislative History*, Senate Document 248, 79th Congress, 2nd sess. (1946).

[39] For discussions of these court cases, see Ellen R. Jordan, "The Administrative Procedure Act's 'Good Cause' Exemption," *Administrative Law Review*, 36 (Spring 1984), pp. 113-178; and Catherine J. Lanctot, "The Good Cause Exception: Danger to Notice and Comment Requirements Under the Administrative Procedure Act," *Georgetown Law Journal*, 68 (Feb. 1980), pp. 765-782.

[40] See *American Federation of Government Employees, AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981); and *Mobay Chemical Corp. v. Gorsuch*, (682 F.2d 419, 426 (3rd Cir.), cert. denied, 459 U.S. 988 (1982)). In another case (*Action on Smoking and Health v. CAB*, 713 F.2d 795, 800 (continued...)

GAO reported in 1998 that about half of the 4,658 final rules published in 1997 were not preceded by an NPRM, and that, in these cases, the agencies most commonly cited the good cause exception.[41]

Congressional Options

Congress may examine proposed and final "midnight" regulations being issued at the end of the Bush Administration and conclude that they should be allowed to go forward. Should Congress conclude otherwise, though, various options are available — even for rules that have already taken effect.

Congressional Review Act

Congress may use its general powers to overturn agency rules by regular legislation. However, for various reasons, Congress may find it difficult to do so. The Congressional Review Act (CRA), enacted in March 1996, was an attempt by Congress to reassert control over agency rulemaking by establishing a special set of expedited or "fast track" legislative procedures for this purpose, primarily in the Senate.

In essence, the act requires that all final rules (including rules issued by independent boards and commissions) to be submitted to both houses of Congress and to GAO before they can take effect. Members of Congress have 60 "days of continuous session" to introduce a joint resolution of disapproval after a rule has been submitted to Congress (hereafter referred to as the "initiation period").[42] The Senate has 60 "session days" from the date the rule is submitted to Congress (or published in the *Federal Register*, if later) to use expedited procedures to act on a resolution of disapproval (hereafter referred to as the "action period").[43] For example, once a joint resolution has reached the floor of the Senate, the CRA makes consideration of the measure privileged, prohibits various other dilatory actions, disallows amendments, and limits floor debate to 10 hours. If passed by both houses of Congress, the joint resolution is then presented to the President for signature or veto. If the President signs the resolution, the CRA specifies not only that the rule "shall not take effect" (or shall not continue if it has already taken effect), but also that the rule may not be reissued

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[40] (...continued)
(D.C. Cir. 1983)), the court said that allowing broad use of the good cause exception would "carve the heart out of the statute."

[41] U.S. General Accounting Office, *Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules*, GAO/GGD-98-126, August 31, 1998.

[42] "Days of continuous session" excludes all days when either the House of Representatives or the Senate is adjourned for more than three days.

[43] "Session days" include only calendar days on which a chamber is in session. Once introduced, resolutions of disapproval are referred to the committees of jurisdiction in each house of Congress. The House of Representatives would consider the resolution under its general procedures, very likely as prescribed by a special rule reported from the Committee on Rules. In the Senate, however, if the committee has not reported a disapproval resolution within 20 calendar days after the regulation has been submitted and published, then the committee may be discharged of its responsibilities and the resolution placed on the Senate calendar if 30 Senators submit a petition to do so.

in "substantially the same form" without subsequent statutory authorization.[44] If, on the other hand, the President vetoes the joint resolution, then (as is the case with any other piece of legislation) Congress can override the President's veto by a two-thirds vote in both houses of Congress.

Under most circumstances, it is likely that the President would veto such a resolution in order to protect rules developed under his own administration, and it may also be difficult for Congress to muster the two-thirds vote in both houses needed to overturn the veto. Of the nearly 50,000 final rules that have been submitted to Congress since the legislation was enacted in March 1996, the CRA has been used to disapprove only one rule — the Occupational Safety and Health Administration's November 2000 final rule on ergonomics.[45]

The March 2001 rejection of the ergonomics rule was the result of a specific set of circumstances created by a transition in party control of the presidency. The majority party in both houses of Congress was the same as the party of the incoming President (George W. Bush). When the new Congress convened in 2001 and adopted a resolution disapproving the rule published under the outgoing President (William J. Clinton), the incoming President did not veto the resolution. Congress may be most able to use the CRA to disapprove rules in similar, transition-related circumstances.[46]

CRA "Carryover" Provisions. The ergonomics disapproval was also an example of the "carryover" provisions in the CRA. Section 801(d) of the CRA provides that, if Congress adjourns its annual session *sine die* less than 60 *legislative days* in the House of Representatives or 60 *session days* in the Senate after a rule is submitted to it, then the rule is subject, during the following session of Congress, to (1) a new initiation period in *both* chambers and (2) a new action period in the Senate.[47] The purpose of this provision is to ensure that *both* houses of Congress have sufficient time to consider disapproving rules submitted during this end-of-session "carryover period." In any given year, the carryover period begins after the 60th legislative day in the House or session day in the Senate before

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[44] For a more detailed discussion of these procedures, see CRS Report RL34633, *Congressional Review Act: Disapproval of Rules in a Subsequent Session of Congress*, by Curtis W. Copeland and Richard S. Beth. For a discussion of the act's implementation, see CRS Report RL30116, *Congressional Review of Agency Rulemaking: An Update and Assessment of the Congressional Review Act After a Decade*, by Morton Rosenberg.

[45] U.S. Department of Labor, Occupational Safety and Health Administration, "Ergonomics Program," 65 *Federal Register* 68261, November 14, 2000. Although the CRA has been used to disapprove only one rule, it may have other, less direct or discernable effects (e.g., keeping Congress informed about agency rulemaking and preventing the publication of rules that may be disapproved).

[46] See, for example, Susan E. Dudley, "Reversing Midnight Regulations," *Regulation*, vol. 24 (Spring 2001), p. 9, who noted that the "veto threat is diminished [after a transition], since the president whose administration issued the regulations is no longer in office." See also testimony of Curtis W. Copeland, in U.S. Congress, House Committee on Government Reform, Subcommittee on Regulatory Affairs, *The Effectiveness of Federal Regulatory Reform Initiatives*, 109th Cong., 1st sess., July 27, 2005, p. 13. See CRS Report RL30116, *Congressional Review of Agency Rulemaking: An Update and Assessment of the Congressional Review Act After a Decade*, by Morton Rosenberg, for a description of this and several other possible factors affecting the law's use.

[47] "Legislative days" end each time a chamber adjourns for the day, and begin each time it convenes after such an adjournment.

the *sine die* adjournment, whichever date is *earlier*. The renewal of the CRA process in the following session occurs even if no resolution to disapprove the rule had been introduced during the session when the rule was submitted.

For purposes of this new initiation period and Senate action period, a rule originally submitted during the carryover period of the previous session is treated as if it had been published in the *Federal Register* on the 15th legislative day (House) or session day (Senate) after Congress reconvenes for the next session. Resolutions of disapproval may be introduced in each chamber at any point in the 60 days of continuous session of Congress that follow the respective date, and the Senate may use expedited procedures to act on the resolution during the 60 days of session that follow the same applicable date.

Implications for Rules Issued in the Second Session of the 110th Congress. Examination of the House and Senate calendars from the second session of the 110th Congress indicates that the cutoff date for the CRA's carryover provisions was May 15, 2008. Any final rule that was sent to Congress after May 15, 2008, would not have had 60 legislative days in the House for congressional disapproval before *sine die* adjournment. According to GAO's CRA database, about 1,800 Bush Administration final rules, including about 700 "significant" or "substantive" rules, were submitted to Congress between May 15, 2008, and *sine die* adjournment of the second session of the 110th Congress.

The Senate reached the 15th session day of the 111th Congress on January 27, 2009, and the House reached the 15th legislative day on January 28, 2009. As a result, resolutions of disapproval can now be submitted regarding rules that were issued during the second session of the 110th Congress. Starting on the 15th legislative or session day of the 111th Congress, such resolutions are in order for 60 "days of continuous session" (i.e., all calendar days except those when either the House of Representatives or the Senate is adjourned for more than three days).

Consolidation of Disapproval Resolutions. In order to qualify for the expedited Senate procedures that the CRA provides, a resolution of disapproval must (among other things) use the language provided for such resolutions in the CRA: "'That Congress disapproves the rule submitted by the XX relating to XX, and such rule shall have no force or effect.' (The blank spaces being appropriately filled in)." This language indicates that a resolution of disapproval can be used to disapprove only one rule at a time. However, a recently issued CRS report suggests ways in which Congress might make use of measures consolidating multiple disapprovals and considered under regular legislative procedures, either in place of or in conjunction with the CRA disapproval process.[48]

Appropriations Provisions

Although the CRA has been used only once to overturn an agency rule, Congress has frequently used provisions added to agency appropriations bills to affect rulemaking and regulations. A CRS analysis of the Consolidated Appropriations Act for 2008 revealed nearly two dozen such provisions in the act, which generally fell into four categories: (1) prohibitions on the finalization of particular proposed rules, (2) prohibitions on the

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[48] CRS Report R40163, *The Congressional Review Act and Possible Consolidation into a Single Measure of Resolutions Disapproving Regulations*, by Richard S. Beth.

development of regulations with regard to particular statutes or issues, (3) restrictions on implementation or enforcement, and (4) conditional restrictions on the development or implementation of particular rules.[49] A review of appropriations legislation that was enacted from FY1999 through FY2007 indicated that many of the regulatory restrictions in the Consolidated Appropriations Act for 2008 had appeared in one or more appropriations statutes in previous years. Some were in relevant appropriations bills in all 10 years, some had been in multiple years (but not all 10), and some were present in only one year. In some cases, the provisions appear to have been designed to slow down or prevent the issuance of "midnight" rules issued near the end of a presidential administration, or to ensure the implementation of rules issued during that period.

These restrictions in appropriations bills illustrate that Congress can have a substantial effect on agency rulemaking and regulatory activity beyond the introduction of joint resolutions of disapproval pursuant to the CRA. However, unlike CRA joint resolutions of disapproval, these appropriations provisions cannot nullify an existing regulation (i.e., remove it from the *Code of Federal Regulations*) or permanently prevent the agency from issuing the same or similar regulations. Therefore, any final rule that has taken effect and been codified in the *Code of Federal Regulations* will continue to be binding law — even if language in the relevant regulatory agency's appropriations act prohibits the use of funds to enforce the rule. Regulated entities are still required to adhere to applicable requirements (e.g., installation of pollution control devices, submission of relevant paperwork), even if violations are unlikely to be detected and enforcement actions cannot be taken by federal agencies.

Also, unless otherwise indicated, regulatory restrictions in appropriations acts are binding only for the period of time covered by the legislation (i.e., a fiscal year or a portion of a fiscal year), and only with respect to the funds appropriated in the act containing the restriction.[50] Therefore, any restriction that is not repeated in the next relevant appropriations act or enacted in other legislation is no longer binding on the relevant agency or agencies. However, some appropriations provisions are worded in such a way that they have essentially become permanent or multi-year requirements.

Most of the regulatory restrictions are in appropriations bills providing funds for particular agencies or groups of agencies. Therefore, the prohibitions are generally applicable only to the agencies funded by that appropriations measure. However, some of the regulatory prohibitions are in the "General Provisions — Government-wide" section of one of the appropriations measures (for FY2008, Title VII of the Financial Services and General Government Appropriations Act), and are, therefore, applicable to virtually all federal agencies. Other provisions are worded in such a way that their effects are broader

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[49] CRS Report RL34354, *Congressional Influence on Rulemaking and Regulation Through Appropriations Restrictions*, by Curtis W. Copeland.

[50] See U.S. General Accounting Office, *Principles of Appropriations Law, Third Edition, Volume I*, GAO-04-261SP, (January 2004), p. 2-34, which states that, "Since an appropriation act is made for a particular fiscal year, the starting presumption is that everything contained in the act is effective only for the fiscal year covered. Thus, the rule is: A provision contained in an annual appropriation act is not to be construed to be permanent legislation unless the language used therein or the nature of the provision makes it clear that Congress intended it to be permanent."

than the agencies funded by those particular appropriations bills (e.g., those that prohibit the use of funds in "this or any other Act" to publish or implement regulations).[51]

On the other hand, some of the appropriations provisions limiting regulatory actions may not be as restrictive as they initially appear. Some federal regulatory agencies derive a substantial amount of their operating funds from sources other than congressional appropriations (e.g., user fees), and the use of those funds to develop, implement, or enforce rules may not be legally constrained by language preventing the use of appropriated funds.[52] Also, some federal regulations (e.g., many of those issued by the Environmental Protection Agency and the Occupational Safety and Health Administration) are primarily implemented or enforced by state or local governments, and those governments may have sources of funding that are independent of the federal funds that are restricted by the appropriations provisions. Some state or local governments may also have their own statutory and regulatory requirements that are the same as or similar to the federal rules at issue, or may even go beyond federal standards.[53] If state or local funds or legal authorities are used to develop, implement, or enforce regulations, those actions would not appear to be constrained by statutory provisions limiting the use of *federal* funds to restrict action on particular *federal* laws and regulations.[54]

Agencies may also find ways around provisions prohibiting the use of appropriated funds for rulemaking or other regulatory actions. For example, if an agency is not permitted to use its appropriation to issue a formal rule on a particular issue, it might attempt to achieve the end result through other means (e.g., a guidance document that, while technically having no binding effect, may be granted great deference by affected parties).[55] More generally, if Congress restricts one agency or group of agencies from issuing a rule on a particular topic, another agency with similar or overlapping statutory authority may be assigned that responsibility.

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[51] See U.S. General Accounting Office, *Principles of Appropriations Law*, p. 2-33, which says that a general provision "may apply solely to the act in which it is contained ('No part of any appropriation contained in this Act shall be used ...'), or it may have general applicability ('No part of any appropriation contained in this or any other Act shall be used ...')."

[52] Others, however, take the view that even these non-appropriated funds must be at least figuratively deposited into the Treasury, and that "all spending in the name of the United States must be pursuant to legislative appropriation." Kate Stith, "Congress' Power of the Purse," *The Yale Law Journal*, vol. 97 (1988), p. 1345.

[53] For example, under the Occupational Safety and Health Act, states may set standards for hazards such as ergonomic injury for which no federal standard has been established. See U.S. General Accounting Office, *Regulatory Programs: Balancing Federal and State Responsibilities for Standard Setting and Implementation*, GAO-02-495, March 2002.

[54] See U.S. Government Accountability Office, *Principles of Federal Appropriations Law, Third Edition, Volume II*, GAO-06-382, February 2006, which says that, unless stated otherwise, expenditures by recipients of federal grants "are not subject to all the same restrictions and limitations imposed on direct expenditures by the federal government. For this reason, grant funds in the hands of a grantee have been said to largely lose their character and identity as federal funds."

[55] See Office of Management and Budget, "Final Bulletin for Agency Good Guidance Practices," 72 *Federal Register* 3432, January 25, 2007. OMB issued the bulletin, in part, because of concerns that agencies were treating guidance documents as binding rules. Nevertheless, as OMB points out, guidance documents can have significant effects on regulated entities.

Legislative Authorization of Executive Branch Authority

The previous sections of this testimony have described options that either Congress or the President could take to address midnight rulemaking. A third, hybrid approach is for Congress to provide new authority to the incoming administration (i.e., either the President or the rulemaking agencies) to stop or change rules issued at the end of a presidency. For example, in the 111th Congress, H.R. 34, introduced by Representative Jerrold Nadler, would delay the effective date of any midnight rule (defined as those adopted in a President's final 90 days in office) until 90 days after the new President appoints the agency head. However, the bill would allow the outgoing President to exempt certain types of rules from such delays by submitting a written notice to Congress. Another provision in H.R. 34 would allow agency heads to disapprove any midnight rules within 90 days of being appointed by the new President by publishing a disapproval statement in the *Federal Register* and sending a notice of disapproval to the congressional committees of jurisdiction.

Legislation such as H.R. 34 could permit expeditious action to address midnight rules issued late in a President's term of office. However, to have the desired effect, key terms in this or other legislation will need to be defined. For example, H.R. 34 is not clear when a rule is considered "adopted" (e.g., publication date versus effective date); what constitutes an "agency head" (e.g., Secretary of Labor versus the Administrator of the Occupational Safety and Health Administration); when an agency head is considered "appointed" (e.g., nomination date versus the date the oath of office is taken); or even what a covered "rule" is (e.g., all rules as defined in Section 551 of the Administrative Procedure Act, or only "notice and comment" rules in Section 553 of the act). Also, Congress will have to consider the balance of power ramifications of giving the President or executive branch officials powers that it had previously reserved for itself.

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Mr. Chairman, that concludes my prepared statement. I would be happy to answer any questions that you or other Members of the Subcommittee might have.