



March 16, 2017

The Honorable Ron Johnson  
Chairman  
U.S. Senate  
Homeland Security & Governmental Affairs Committee  
Washington, DC 20515

The Honorable Claire McCaskill  
Ranking Member  
U.S. Senate  
Homeland Security & Governmental Affairs Committee  
Washington, DC 20515

RE: Committee mark-up of S. 34, the Midnight Rules Relief Act of 2017

Dear Senator:

The Coalition for Sensible Safeguards (CSS), which includes more than 150 diverse labor, environmental, consumer, public health, food safety, financial reform, faith, and scientific integrity groups representing millions of Americans, strongly opposes S. 34, the Midnight Rules Relief Act of 2017.

S. 34 would amend the Congressional Review Act to allow simultaneous disapproval of dozens of regulations finalized near the end of presidential terms using a single joint resolution.

The proposed legislation is based on a fatally flawed premise—namely, that regulations which are proposed or finalized during the so-called “midnight” rulemaking period are rushed and inadequately vetted. In fact, the very opposite is true. For example, the “midnight” period of the Obama Administration’s saw the completion of dozens of public health and safety regulations that had been in the regulatory process for years or decades, including many that date from the Obama Administration’s first term or implement laws passed in the first term. Some even predate the Obama Administration entirely. All would have been covered S. 34.

In July 2016, Public Citizen released a report<sup>1</sup> that compared rulemaking lengths for rules finalized in the “midnight” or presidential transition period to those that were finalized outside of this period. The results were noteworthy. The report found that rules issued during the presidential transition period spent *even more time* in the rulemaking process and received *even more extensive vetting* than other rules.

After examining all economically significant rulemakings that have been finalized since 1999, Public Citizen’s report found that rules issued during the transition period took on average 3.6 years to complete – almost an entire presidential term – compared to 2.8 years for all other rules. Likewise, the time it took the U.S. Office of Information and Regulatory Affairs (OIRA) to review midnight rules was no shorter, and in some cases longer, than non-midnight rules.

A recent analysis by the Center for Progressive Reform of the Obama-era rules that Congress has used the CRA to eliminate in recent weeks confirms these findings. This analysis finds that the 14 rules that were targeted for elimination had been in development for an average of three years. In fact, two of these rules – the Department of the Interior’s “stream protection rule” and the Security and Exchange Commission’s anti-corruption rule – had been in development for seven years each.<sup>2</sup>

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<sup>1</sup> PUBLIC CITIZEN, SHINING A LIGHT ON THE “MIDNIGHT RULE” BOOGYMAN: AN ANALYSIS OF ECONOMICALLY SIGNIFICANT RULES REVIEWED BY OIRA, (July, 2016), <http://citizen.org/documents/Midnight-Regs-Myth.pdf>

<sup>2</sup> Center for Progressive Reform, CRA by the Numbers: The Congressional Review Act Assault on Our Safeguards, [http://www.progressivereform.org/CRA\\_numbers.cfm](http://www.progressivereform.org/CRA_numbers.cfm) (last visited May 11, 2017).

In addition, many of these regulations are mandated by Congress and have missed rulemaking deadlines prescribed by Congress. Referring to regulations that have been under consideration by federal agencies for years, and in some instances decades, as “rushed” is false.

Prominent administrative law experts have also concluded that the concerns regarding these regulations are not borne out by the evidence. For example, in 2012 the Administrative Conference of the United States (ACUS) conducted an extensive study of regulations finalized near the end of previous presidential terms and found that many “midnight regulations” were “relatively routine matters not implicating new policy initiatives by incumbent administrations.”<sup>3</sup>

ACUS also found that the “majority of the rules appear to be the result of finishing tasks that were initiated before the Presidential transition period or the result of deadlines outside the agency’s control (such as year-end statutory or court-ordered deadlines).” ACUS concluded that “the perception of midnight rulemaking as an unseemly practice is worse than the reality.”

Indeed, opponents of midnight regulations have not presented any persuasive empirical evidence supporting claims that regulations finalized near the end of presidential terms were rushed or did not involve diligent compliance with mandated rulemaking procedures. Instead, those opponents make unsubstantiated claims based solely on when a regulation was finalized, ignoring the marathon rulemaking process that those rules underwent.

In reality, compliance with the current lengthy regulatory process prevents agencies from finalizing new regulations efficiently, and thus earlier in presidential terms. This is because many of the regulations that Congress intended to provide the greatest benefits to the public’s health, safety, financial security, and the environment currently take several years,<sup>4</sup> decades in some instances, for agencies to implement due to the extensive and, in many cases, redundant procedural and analytical requirements that comprise the rulemaking process.

Indeed, CSS maintains that the inherent inefficiency of the current regulatory process, leading to regulatory delays and paralysis across agencies, is the primary area in most of need of urgent attention and reform by this Congress.

In the end, it is difficult to overlook the tragic irony at the heart of S. 34. It would empower Congress to use the Congressional Review Act (CRA)—a process that is rushed and nontransparent and that discourages informed decision-making—to block at the 11<sup>th</sup> hour rules that have completed the journey through the onerous rulemaking process.

Unlike the CRA’s expedited procedures, agency rules are subjected to myriad accountability mechanisms, and, for each rule, the agency must articulate a policy rationale that is supported by the rulemaking record and consistent with the requirements of the authorizing statute. In contrast, members of Congress do not have to articulate a valid policy rationale—or any rationale at all—in support of CRA resolutions of disapproval. Quite simply, they can be, and often are, an act of pure politics. Indeed, nearly all of the successful CRA resolutions targeting Obama-era rules in recent weeks have passed by narrow partisan majorities.<sup>5</sup>

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<sup>3</sup> Administrative Conference Recommendation 2012-2, Midnight Rules, Adopted June 14, 2012, pp. 1-2, at <http://www.acus.gov/wp-content/uploads/downloads/2012/06/Final-Recommendation-2012-2-Midnight-Rules.pdf>

<sup>4</sup> PUBLIC CITIZEN, UNSAFE DELAYS: AN EMPIRICAL ANALYSIS SHOWS THAT FEDERAL RULEMAKINGS TO PROTECT THE PUBLIC ARE TAKING LONGER THAN EVER (June, 2016), <http://www.citizen.org/documents/Unsafe-Delays-Report.pdf>

<sup>5</sup> Center for Progressive Reform, CRA by the Numbers: The Congressional Review Act Assault on Our Safeguards, [http://www.progressivereform.org/CRA\\_numbers.cfm](http://www.progressivereform.org/CRA_numbers.cfm) (last visited May 11, 2017)

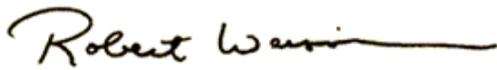
S. 34 would make the situation even worse. It would, in effect, demand that all members of Congress have adequate expertise on all of the rules that would be targeted by a single disapproval resolution. Such a scenario would be highly unlikely.

It would also risk encouraging members to engage in “horse trading” to add still more rules to the disapproval resolution until enough votes have been gathered to ensure the resolution’s passage. Surely, this approach to policymaking cannot be defended as superior to that undertaken by regulatory agencies.

The Obama Administration ended on January 20, 2017. It was incumbent on them to do their constitutional duty to implement the laws of Congress until that date. CSS urges members to reject both the bill and false and misleading rhetoric that bears no reality to the real problems of excessive and systemic delay in the regulatory process.

We strongly urge opposition to S. 34, the Midnight Rules Relief Act of 2017.

Sincerely,

A handwritten signature in black ink that reads "Robert Weissman". The signature is written in a cursive, flowing style with a long horizontal stroke at the end.

Robert Weissman, President  
Public Citizen  
Chair, Coalition for Sensible Safeguards

*The Coalition for Sensible Safeguards is an alliance of consumer, labor, scientific, research, good government, faith, community, health, environmental, and public interest groups, as well as concerned individuals, joined in the belief that our country’s system of regulatory safeguards provides a stable framework that secures our quality of life and paves the way for a sound economy that benefits us all.*