

MIDNIGHT RULE RELIEF ACT OF 2012

JUNE 1, 2012.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. ISSA, from the Committee on Oversight and Government Reform, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany H.R. 4607]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 4607) to ensure economy and efficiency of Federal Government operations by establishing a moratorium on midnight rules during a President's final days in office, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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COMMITTEE STATEMENT AND VIEWS

PURPOSE AND SUMMARY

H.R. 4607, the Midnight Rule Relief Act, aims to promote economy and efficiency of Federal Government operations by establishing a moratorium on midnight rules during an outgoing President's final days in office. The President may waive the moratorium for purposes of an imminent threat to health or safety, to enforce criminal laws, to protect national security, or pursuant to an international trade agreement.

BACKGROUND AND NEED FOR LEGISLATION

It is widely acknowledged that “midnight regulations”—regulations issued in the final days of an outgoing President’s term in office—are problematic.¹ According to political scientists, the period after Election Day through Inauguration Day—the so-called “lame duck” period—allows the sitting President to use Executive Branch tools to implement policies that would likely be “checked and halted” by Congress during any other period.² During the lame duck period, sitting Presidents largely lack accountability and have every incentive to issue last-minute rules to extend their influence past their days in office. In 2008, Democratic Representative Jerrold Nadler identified the need to address this problem and introduced the “Midnight Rule Act,” to curb a President’s ability to push through the last minute regulatory goals of an outgoing Administration. In testimony before the House Judiciary Committee, Representative Nadler pointed out that “the 22nd Amendment to the Constitution limits a president to two terms in office. Midnight rules can be abused to allow a president to reach into a third term without any accountability.”³

Empirical evidence demonstrates that Presidents from both parties tend to rush through midnight regulations at the end of their term. Since 1948, when control of the White House is about to switch to the opposite party, the volume of regulations promulgated by the outgoing Administration during the lame duck period averaged 17 percent higher than the volume of rules typically issued during the same calendar period.⁴ This trend is even more dramatic in years since 1970—peaking in 1980, 1992, and 2000, when there was a switch in party control.⁵ President Clinton’s regulatory activity skyrocketed during his lame duck tenure. The outgoing Clinton Administration published 51 percent more pages of regulations in the Federal Register during that quarter than it did relative to the average number of pages published during the same quarter of the prior three years of the second Clinton Administra-

¹ See Jerry Brito and Veronique De Rugy, *For Whom the Bell Tolls: The Midnight Regulations Phenomenon*, Mercatus Center George Mason University (December 2008); see also *Midnight Rulemaking: Shedding Some Light: Hearing before the H. Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. (2009).

² Jerry Brito and Veronique De Rugy, *For Whom the Bell Tolls: The Midnight Regulations Phenomenon*, Mercatus Center George Mason University (December 2008).

³ *Midnight Rulemaking: Shedding Some Light: Hearing Before the H. Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Representative Jerrold Nadler).

⁴ Jerry Brito and Veronique De Rugy, *For Whom the Bell Tolls: The Midnight Regulations Phenomenon*, Mercatus Center George Mason University (December 2008).

⁵ *Id.*

tion.⁶ According to President Clinton's former chief of staff, John Podesta, "starting in early 1999, [they] had people down in the White House basement with word processors and legal pads making lists of things [they] wanted to get done before [they] left."⁷ Mr. Podesta opined, at the time, that the George W. Bush Administration "probably [have] people down there right now with chain saws and drilling rigs doing the same thing."⁸ Moreover, major rules—those with an annual effect of \$100 million or more on the economy—also increase at the end of presidential administrations. Studies show that during lame duck periods between February 1981 and January 2009, the number of major rules submitted to the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) increased by just over 50%.⁹

Outgoing presidents, of either party, might want to impose a cost on the incoming administration and seriously complicate their early days in office. Professors of law and business at the University of Illinois, University of Texas, and Case Western Reserve University explain that, "by issuing regulations that make the life of the incoming administration harder, outgoing regulators can earn political capital with their core constituencies, position themselves for rewards in post-administration jobs with interest groups or in a future campaign or administration for their own party."¹⁰ These same professors also stated that "regulators in the lame duck period are not only freed from political fallout from their actions but have positive incentives to cause problems for the incoming administration."¹¹

Midnight rules are also problematic because an incoming president cannot easily repeal them. Political realities and legal obstacles prevent this. Political scientists explain that "not only does [repealing rules] take time, but changing the status quo probably means taking on interest groups who are reticent to give up ground that they have just won."¹² For example, President George W. Bush encountered extreme difficulty modifying a President Clinton arsenic regulation issued in January 2001.¹³ Despite public disapproval of the rule when it was issued, President Bush faced significant opposition when he tried to undo it three months later, and his effort was ultimately unsuccessful.¹⁴ Regulated entities also cannot rely on a subsequent administration to repeal a controversial rule once it has been finalized; therefore, they must take steps to comply with the rule regardless of the potential for repeal.

Midnight regulations can undercut the benefits of a robust regulatory review process. Despite an increase in regulations at the end of presidential administrations, there is no corresponding increase in resources available to OIRA, which is charged with ensuring

⁶ Susan Dudley, "Reversing Midnight Regulations," *Regulation Magazine*, Spring 2001.

⁷ Jerry Brito and Veronique De Rugy, *For Whom the Bell Tolls: The Midnight Regulations Phenomenon*, Mercatus Center George Mason University (December 2008).

⁸ *Id.*

⁹ Patrick A. McLaughlin, *The Consequences of midnight regulations and other surges in regulatory activity*, *Public Choice*, Apr. 8, 2010.

¹⁰ Jerry Brito and Veronique De Rugy, *For Whom the Bell Tolls: The Midnight Regulations Phenomenon*, Mercatus Center George Mason University (December 2008).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

that rules undergo a proper cost-benefit analysis.¹⁵ Consequently, the duration of the OIRA review process is truncated. The average review time for midnight regulations issued between 1994 and 2009 was approximately 25 days shorter than the review time of other rules.¹⁶ This is of concern because economists have found that as the length of OIRA review time decreases, the quality of the economic analysis to which rules are subject also decreases.¹⁷

Research compiled by the American Action Forum found that at least 25 major regulations could be finalized by the Obama Administration in 2012 if President Obama loses the election in November.¹⁸ An examination of the costs of those midnight regulations (current and planned) indicates that they could cost the economy more than \$220 billion.¹⁹ The Midnight Rule Relief Act of 2012 will ensure that the current Administration and future Administrations—of either party—has a system of checks and balances on its regulatory powers.

LEGISLATIVE HISTORY

H.R. 4607, the Midnight Rule Relief Act of 2012, was introduced on April 24, 2012, by Representative Reid Ribble (R-WI) and referred to the Committee on Oversight and Government Reform. The bill was also referred to the Committee on the Judiciary. On April 25, 2012, Senator Ron Johnson (R-WI) introduced a Senate companion bill, S. 2368. On April 26, 2012, the Committee on Oversight and Government reform considered H.R. 4607 and ordered it to be favorably reported, by voice vote.

In the 110th Congress, Representative Jerrold Nadler (D-NY) introduced H.R. 7296, the Midnight Rule Act, to delay the implementation of agency rules adopted within the final 90 days of the final term a President serves.

SECTION-BY-SECTION

Section 1. Short title

This Act may be cited as the, “Midnight Rule Relief Act of 2012.”

Section 2. Moratorium on midnight rules

This section provides that a Federal agency may not propose or finalize any midnight rule during the moratorium period (i.e., after Election Day through Inauguration Day of the following year if a President is not serving consecutive terms) if the rule is likely to result in—

- (A) an annual effect on the economy of \$100,000,000 or more;
- (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
- (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of

¹⁵ *Id.*

¹⁶ Patrick McLaughlin & Jerry Ellig, *Does OIRA Review Improve the Quality of Regulatory Impact Analysis? Evidence from the Final Year of the Bush II Administration*, 63 Admin L. Rev. (Special Edition) 179 (2011).

¹⁷ *Id.*

¹⁸ Sam Batkins, Curbing Midnight Regulation Could Save \$220 Billion, American Action Forum, Apr. 12, 2012.

¹⁹ *Id.*

United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

Section 3. Special rule on statutory, regulatory, and judicial deadlines

This section exempts from the moratorium rules scheduled to be proposed or finalized during the moratorium period pursuant to a pre-existing statutory or judicial deadline.

Section 4. Exceptions

This section provides that a Federal agency may propose or finalize a midnight rule during the moratorium period if the President determines that it is necessary because of an imminent threat to health or safety, the enforcement of criminal laws, national security, or for the purpose of implementing an international trade agreement.

This section also provides that an agency may propose or finalize a midnight rule during the moratorium period if the OIRA Administrator determines that the rule is deregulatory in nature.

This section also states that any exceptions be published in the Federal Register not later than 30 days after their determination.

Section 5. Definition

This section defines “agency” to include Executive Branch and independent agencies, but specifically exempts the Federal Election Commission, the Federal Reserve, the Federal Deposit Insurance Corporation, and the United States Postal Service.

This section defines “deadline” as any date certain for fulfilling any obligation or exercising authority established by or under any Federal statute or rule, or by or under any court order implementing any Federal statute, regulation or rule.

This section defines “moratorium period” as the day after Election Day through Inauguration Day of the following year in a year in which the President is not serving consecutive terms.

This section defines “midnight rule” as any agency statement of general applicability and future effect, issued during the moratorium period, that is intended to have the force and effect of law and is designed to implement, interpret, or prescribe law or policy, or to describe the procedure or practice of an agency.

The section defines “rule” as the meaning given the term under section 551 of title 5, U.S.C.

EXPLANATION OF AMENDMENTS

No amendments to H.R. 4607 were offered.

COMMITTEE CONSIDERATION

On April 26, 2012, the Committee met in open session and ordered reported favorably the bill, H.R. 4607, by voice vote, a quorum being present.

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ONE HUNDRED TWELFTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON THE JUDICIARY

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June 1, 2012

HAND-DELIVERED

The Honorable Darrell Issa
Chairman
Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Issa,

Reference is made to H.R. 4607, the "Midnight Rule Relief Act of 2012," with respect to which the Committee on the Judiciary received a referral. As a result of your having consulted with the Judiciary Committee concerning provisions of the bill that fall within our Rule X jurisdiction, I to agree to discharge the Committee on the Judiciary from further consideration of the bill so that the bill may proceed expeditiously to the House Floor.

The Judiciary Committee takes this action with our mutual understanding that, by foregoing consideration of H.R. 4607 at this time, we do not waive any jurisdiction over the subject matter contained in this or similar legislation, and that our committee will be appropriately consulted and involved as the bill or similar legislation moves forward so that we may address any remaining issues that fall within our Rule X jurisdiction. Our committee also reserves the right to seek appointment of an appropriate number of conferees to any House-Senate conference involving this or similar legislation, and requests your support for any such request.

Finally, I would appreciate your response to this letter confirming this understanding with respect to H.R. 4607, and would ask that a copy of our exchange of letters on this matter be included in your committee's report on the same and/or the *Congressional Record* during floor consideration thereof.

Sincerely,

Lamar Smith
Chairman

Hon. Darrell Issa
June 1, 2012
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cc: The Honorable John Boehner
The Honorable John Conyers, Jr.
The Honorable Elijah Cummings
Mr. Tom Wickham, Jr.

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ONE HUNDRED TWELFTH CONGRESS
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COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
 2157 RAYBURN HOUSE OFFICE BUILDING
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June 1, 2012

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

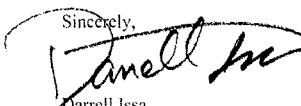
Dear Mr. Chairman:

Thank you for your letter regarding the Committee on the Judiciary's jurisdictional interest in H.R. 4607, the Midnight Rule Relief Act of 2012, and your willingness to forego consideration of H.R. 4607 by your committee.

I agree that the Judiciary Committee has a valid jurisdictional interest in certain provisions of H.R. 4607 and that the Committee's jurisdiction will not be adversely affected by your decision to forego consideration of H.R. 4607. As you have requested, I will support your request for an appropriate appointment of outside conferees from your Committee in the event of a House-Senate conference on this or similar legislation should such a conference be convened.

Finally, I will include a copy of your letter and this response in the Committee Report and in the *Congressional Record* during the floor consideration of this bill. Thank you again for your cooperation.

Sincerely,


Darrell Issa

Chairman

cc: The Honorable John A. Boehner, Speaker

The Honorable John Conyers, Jr., Ranking Minority Member
Committee on the Judiciary

The Honorable Elijah E. Cummings, Ranking Minority Member
Committee on Oversight and Government Reform

Mr. Tom Wickham, Parliamentarian

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to the terms and conditions of employment or access to public services and accommodations. This bill establishes a moratorium on midnight rules during an outgoing President's final days in office. As such this bill does not relate to employment or access to public services and accommodations.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goals and objectives are reflected in the descriptive portions of this report.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of 5 U.S.C. App., Section 5(b).

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement as to whether the provisions of the report include unfunded mandates. In compliance with this requirement the Committee has received a letter from the Congressional Budget Office included herein.

EARMARK IDENTIFICATION

H.R. 4607 does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

COMMITTEE ESTIMATE

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out H.R. 4607. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the

Congressional Budget Act of 1974 and with respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 4607 from the Director of Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 10, 2012.

Hon. DARRELL E. ISSA,
*Chairman, Committee on Oversight and Government Reform,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4607, the Midnight Rule Relief Act of 2012.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 4607—Midnight Rule Relief Act of 2012

H.R. 4607 would prohibit federal agencies from promulgating significant regulatory actions from Election Day through Inauguration Day unless an incumbent President is reelected. The bill defines significant regulatory actions as those having an impact of more than \$100 million on the economy, causing major increases in costs or prices, or having adverse effects on consumers and business. The legislation, however, would provide a number of exemptions to the prohibition.

Considering the short time frame proposed for prohibiting regulatory actions and the broad exemption authority that would be provided, CBO estimates that implementing H.R. 4607 would have no significant impact on the budget. Pay-as-you-go procedures do not apply because the bill would not affect direct spending or revenues.

H.R. 4607 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Matthew Pickford. This estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL AS REPORTED

There are no changes to existing law in H.R. 4607.

MINORITY VIEWS

Committee Democrats oppose H.R. 4607, The Midnight Rule Relief Act of 2012. To ban virtually all regulations finalized while a President is concluding his service in office would significantly hamper the ability of federal agencies to implement regulations that are critical to protecting the health and safety of the American people.

Committee Democrats by no means endorse all “midnight rulemakings.” When extensive shortcuts are taken, such rule-making can raise significant fairness concerns. But the value of a given rule should not be judged based solely on when it becomes final. Government must continue to protect our health, safety, environment, and economy no matter how long a President has left in his term.

H.R. 4607 is based on the false premise that business investment and hiring is being held back by uncertainty over future regulations. The bill disregards evidence from economists on both sides of the political spectrum that regulations do not negatively impact the economy or job growth.²⁰

Regulations save lives, protect the health and safety of hundreds of millions of Americans, and provide protections that are critical to the functioning of a healthy economy. This legislation needs to be more narrowly tailored to avoid harming the economy or impairing the health and safety of Americans.

ELIJAH CUMMINGS.



²⁰Economic Policy Institute, *Regulatory Uncertainty: A Phony Explanation for Our Jobs Problem* (Sept. 27, 2011) (online at www.epi.org/publication/regulatory-uncertainty-phony-explanation/); House Committee on Education and Workforce, Testimony of Jared Bernstein, *Hearing on Expanding Opportunities for Job Creation*, 112th Cong. (Feb. 1, 2012) (citing evidence that it is weak demand rather than regulation that is preventing faster job creation.); *Misrepresentations, Regulations and Jobs*, New York Times (Oct. 4, 2011) (“regulatory uncertainty is a canard invented by Republicans that allows them to use current economic problems to pursue an agenda supported by the business community year in and year out”) (online at www.economix.blogs.nytimes.com/2011/10/04/regulation-and-unemployment/?smid=tw-nytimes&seid=auto).