

No. 12-33
November 2012

WORKING PAPER

**REGULATING IN THE DARK:
Examining Bush Midnight Regulations**

By Sherzod Abdukadirov



MERCATUS CENTER
George Mason University

The opinions expressed in this Working Paper are the author's and do not represent official positions of the Mercatus Center or George Mason University.

Regulating in the Dark: Examining Bush Midnight Regulations

Sherzod Abdukadirov

Abstract

This paper examines whether political motivation plays a role in the timing of some midnight regulations. It further examines whether political motivation has a negative impact on the analytical quality of midnight regulations. In contrast to other studies that focus on the overall regulatory activity using proxies, this paper concentrates on a detailed analysis of three regulations issued in the final days of the Bush administration.

JEL code: K23

About the author

Sherzod Abdukadirov
sabdukad@gmu.edu

Sherzod Abdukadirov is a research fellow at the Regulatory Studies Program at the Mercatus Center at George Mason University. His research interests include democratic transition, autocratic governance, and social complexity. His recent research has appeared in the journals *Constitutional Political Economy*, *Studies in Conflict and Terrorism*, and *Asian Journal of Political Science*. Abdukadirov earned his BS in information technology from Rochester Institute of Technology and his PhD in public policy from George Mason University.

Mercatus Center
George Mason University
3351 North Fairfax Drive, 4th Floor
Arlington, VA 22201-4433
(703) 993-4930
mercatus.org

Release date: November 8, 2012

Regulating in the Dark: Examining Bush Midnight Regulations

Conventional wisdom holds that presidents' powers quickly evaporate the moment they are voted out of office.¹ Members of Congress and even career executives within federal agencies have little reason to heed a lame-duck president's advice or fear retaliation. Consequently, a lame-duck president's ability to push legislation through Congress or enact political priorities greatly diminishes. This view, however, underestimates the arsenal of political tools at the president's disposal. In the absence of congressional cooperation, outgoing administrations turn to executive orders, memoranda, and regulations to pursue their political priorities. Research indicates that they make extensive use of their arsenal to promote a favored political agenda.

As presidential terms near their end, midnight regulations often resurface in the public discourse. The Clinton administration was criticized for publishing a record number of regulations in its final days.² George W. Bush administration's last minute rulemaking drew similar criticism.³ In recent years, Congress took up the issue as well. In anticipation of a midnight regulatory surge at the end of the Bush administration, New York Democrat Jerrold Nadler introduced "Midnight Rule Act" on November 20, 2008.⁴ The bill called for a delay in implementing the agency rules adopted in the last 90 days of a president's final term. Gearing up for the potential midnight period of the Obama administration, a Wisconsin Republican Reid Ribble introduced a similar bill in 2012 that called for a moratorium on midnight regulations.⁵

Despite the frequent criticism of midnight regulations in media and Congress, evidence of their negative impact is mixed. While the surge in midnight regulations is well documented,⁶ the motivation behind it and whether the surge presents a problem is subject to debate.⁷ Scholars question whether the last minute surge stems from benign procrastination or if regulations' timing is politically motivated.⁸ In addition, some scholars argue that midnight regulations tend to be rushed and have lower analytical quality, thereby wasting societal resources.⁹

¹ William G. Howell and Kenneth R. Mayer, "The Last One Hundred Days," *Presidential Studies Quarterly* 35, no. 3 (2005): 533–53.

² Susan E. Dudley, "Reversing Midnight Regulations," *Regulation* 24, no. 1 (2001): 9.

³ Elizabeth Kolbert, "Midnight Hour," *New Yorker*, November 24, 2008.

⁴ Midnight Rule Act, H.R. 7296, 110th Cong. (2008)

⁵ Midnight Rule Relief Act of 2012, H.R. 4607, 112th Cong. (2012)

⁶ Veronique de Rugy and Antony Davies, "Midnight Regulations and the Cinderella Effect," *Journal of Socio-Economics* 38, no. 6 (2009): 886–90; Patrick A. McLaughlin, "The Consequences of Midnight Regulations and Other Surges in Regulatory Activity," *Public Choice* 147, no. 3 (2011): 395–412.

⁷ See Jack M. Beermann, "Presidential Power in Transitions," *Boston University Law Review* 83, no. 5 (2003): 947–1017.

⁸ Jack M. Beermann, *Midnight Rules: A Reform Agenda (Draft Report)* (Washington, DC: Administrative Conference of the United States, March 13, 2012), <http://www.acus.gov/wp-content/uploads/downloads/2012/03/Revised-Draft-Midnight-Rules-Report-3-13-12.pdf>.

⁹ Jerry Ellig, Patrick A. McLaughlin, and John F. Morrall III, "Continuity, Change, and Priorities: The Quality and Use of Regulatory Analysis across US Administrations," *Regulation & Governance* (2012).

In this paper, I examine whether political motivation plays a role in the timing of some midnight regulations. I further examine whether political motivation has a negative impact on the analytical quality of midnight regulations. In contrast to other studies that focus on the overall regulatory activity using proxies, I concentrate on a detailed analysis of three regulations issued in the final days of the Bush administration.

Midnight Regulations

Last minute bursts of administrative activity have long been subject to scrutiny and criticism.¹⁰ A number of studies provide empirical support to the claim that outgoing administrations ramp up regulatory activity during the midnight period. Since all new regulations are published in the *Federal Register*, scholars commonly use the number of pages added to the *Federal Register* as a metric of regulatory activity. In one study, Veronique de Rugy and Anthony Davies found that the share of pages added to the *Federal Register* during midnight months is 17 percentage points higher compared to non-midnight months.¹¹ The regulatory surge was evident regardless of election outcomes; however, a switch in the party controlling the White House led to a higher 20 percent surge.¹²

As a proxy for regulatory activity, the *Federal Register* has a few drawbacks. In addition to regulations, the *Federal Register* publishes presidential documents and other non-rulemaking documents. Thus, not all pages in the *Federal Register* reflect regulatory activity. Crucially, a rule's length does not necessarily indicate its impact on the economy and society. A relatively short rule may have substantial society-wide implications, whereas a lengthy rule may impact only a few individuals. To avoid these pitfalls, Patrick McLaughlin examined the number of economically significant rules sent for review to the White House Office of Information and Regulatory Affairs (OIRA).¹³ According to President Clinton's Executive Order 12866, economically significant regulations "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 government or communities."¹⁴ Given their potential impact on the economy, all economically significant regulations are subject to stringent analytical requirements and have to be submitted to OIRA for review prior to publication in the *Federal Register*. McLaughlin examined the data from OIRA's website and found that the number of economically significant regulations submitted for OIRA review increased 7 percent during the midnight period compared to the rest of the year. This shortened OIRA's average review time from the typical 50 days to half that period (25 days), potentially reducing the quality of OIRA's oversight.¹⁵

¹⁰ Nina A. Mendelson, "Agency Burrowing: Entrenching Policies and Personnel before a New President Arrives," *New York University Law Review* 78, no. 2 (2003): 557–668; Howell and Mayer, "The Last One Hundred Days."

¹¹ De Rugy and Davies, "Midnight Regulations and the Cinderella Effect."

¹² Ibid.

¹³ McLaughlin, "The Consequences of Midnight Regulations and Other Surges in Regulatory Activity."

¹⁴ "Executive Order 12866: Regulatory Planning and Review," *Federal Register* 58, no. 190 (October 4, 1993): 51735–45.

¹⁵ Since no direct measures of OIRA's oversight quality exist, McLaughlin uses OIRA's review time as a proxy for oversight quality.

Scholars identify a number of reasons behind the midnight regulatory surge. Jay Cochran attributed the surge to turnover among political appointees facing what he termed a “Cinderella constraint”: at the stroke of midnight the president and heads of executive agencies turn into ordinary citizens, so they have to rush their preferred policies through before their time is up.¹⁶ This leads to a surge in regulations at the end of the presidential term. The turnover of agency executives is higher if an incumbent president loses the election, producing a greater midnight surge. Yet even if the president is re-elected, many agency heads leave the office, leading to a mini-surge. Last minute regulations, in this view, aim to project an outgoing administration’s influence beyond its term, especially if the incoming administration belongs to the opposite party.

Another possibility is that agencies wait until the last minute to pass controversial regulations in order to avoid political fallout.¹⁷ During the term, the president’s actions are moderated by the need to stand for re-election and to cooperate with Congress to push the administration’s political agenda forward. Similarly, agency executives have to work with congressional committees to secure funding for their agencies’ budgets. During the midnight period, the president and agency executives are no longer bound by these constraints. Once the election results are announced, neither voters nor Congress members can exact a price on the outgoing administration. Consequently, agencies wait until the midnight period to announce controversial regulation in order to minimize the political costs of their actions. In addition, an outgoing administration may regulate in order to embarrass the incoming administration by forcing it publicly repeal a regulation.¹⁸

In some cases, agencies may be precluded by Congress or judiciary from regulating before the midnight period.¹⁹ For example, Congress may prevent an agency from using any funds to promulgate a particular regulation. When the de facto congressional moratorium is lifted, agencies have only a short window of time to push the regulation through. In this case, the factors leading to the last minute regulation are external.

A recent report commissioned by the Administrative Conference of the United States (ACUS), an independent federal agency dedicated to improving the administrative process, found midnight regulatory surge results primarily from the agencies’ attempts to complete the work prior to the change in administration.²⁰ Transitions often interfere with rulemaking since it takes time for new administrations to fully staff agencies with their political appointees, leading to substantial delays. Rules that span more than one administration on average take twice as long to complete, even if they are not

¹⁶ Jay Cochran, *The Cinderella Constraint: Why Regulations Increase Significantly during Post-Election Quarters*, Working Paper (Mercatus Center, George Mason University, March 2001).

¹⁷ Beermann, “Presidential Power in Transitions.”

¹⁸ Andrew P. Morriss, Roger E. Meiners, and Andrew Dorchak, “Between a Hard Rock and a Hard Place: Politics, Midnight Regulations and Mining,” *Administrative Law Review* 55, no. 3 (2003): 551–606.

¹⁹ Beermann, “Presidential Power in Transitions.”

²⁰ Beermann, *Midnight Rules*.

politically controversial.²¹ Wary of potential delays, agencies may rush to complete regulations before the administration changes.

Critics of midnight regulations charge that outgoing administrations use the lack of political accountability and congressional oversight during the midnight period to push through sweeping controversial regulations.²² Agencies overreach in an effort to embarrass incoming administrations.²³ The political motives behind midnight regulations are reflected in their poor analytical quality as regulatory analyses are drafted to satisfy procedural requirements and to justify preferred policies.²⁴ The midnight surge also leads to shorter OIRA review times and consequently less stringent oversight.²⁵

Another major criticism is that undoing the midnight regulations is costly. Once finalized, regulations are hard to repeal.²⁶ The process of modifying or repealing an existing regulation is the same as the process of passing a new one. Each rule must be published in the *Federal Register* and be open for public comments. Agencies have to respond to public comments in their final rulemaking. There are additional requirements for rules that impose unfunded mandates on state, local, or tribal governments and for rules that impose substantial costs on small businesses. Some agencies must comply with agency-specific procedural requirements. In addition, agencies have to prepare a Regulatory Impact Analysis (RIA) for economically significant rules. The latter are also subject to OIRA review. Not only does this process take time and resources, it distracts the incoming administration from its own policy priorities.²⁷ The administration also needs to expend political capital to counter the special interests that quickly form around every government policy.²⁸ As a result, final regulations are often left in place.

Attempts to Curb Midnight Regulations under the Bush Administration

In contrast to its predecessors, the Bush administration attempted to curb midnight regulations. On May 9, 2008, the White House Chief of Staff Joshua Bolten issued a memo calling executive agencies to “resist the historical tendency of administrations to increase regulatory activity in their final months.”²⁹ The memo instructed the agencies that, except in extraordinary circumstances, regulations to be finalized in the Bush administration should be proposed by June 1, 2008 and finalized by November 1, 2008. It asked OIRA to monitor the agencies’ compliance with the memo.

²¹ Anne Joseph O’Connell, “Agency Rulemaking and Political Transitions,” *Northwestern University Law Review* 105, no. 2 (2011): 471–534.

²² Jack M. Beermann, “Combating Midnight Regulation,” *Northwestern University Law Review Colloquy* 103 (2009): 353–69; Howell and Mayer, “The Last One Hundred Days.”

²³ Morriss, Meiners, and Dorchak, “Between a Hard Rock and a Hard Place.”

²⁴ Patrick A. McLaughlin and Jerry Ellig, “Does OIRA Review Improve the Quality of Regulatory Impact Analysis? Evidence from the Final Year of the Bush II Administration,” *Administrative Law Review* 63, no. Special Edition (2011): 179–202.

²⁵ McLaughlin, “The Consequences of Midnight Regulations and Other Surges in Regulatory Activity.”

²⁶ Dudley, “Reversing Midnight Regulations.”

²⁷ Morriss, Meiners, and Dorchak, “Between a Hard Rock and a Hard Place.”

²⁸ Susan E. Dudley, “Lessons Learned, Challenges Ahead,” *Regulation* 32, no. 2 (2009): 6–11.

²⁹ Memorandum from Joshua B. Bolten, White House Chief of Staff, to Heads of Executive Departments & Agencies (May 9, 2008), available at <http://www.ombwatch.org/files/regs/PDFs/BoltenMemo050908.pdf>.

Despite the express instruction to finalize rules by November 1, 2008, regulatory activity increased in the administration's final quarter.³⁰ However, the Bush administration witnessed a smaller surge compared to its predecessors.³¹ Specifically compared to the Clinton administration, Bush administration's regulatory activity was lower both in its final year overall and during the midnight period.³² In addition, the Bolten memo appears to have shifted some regulatory activity from midnight to pre-election quarter.³³ Consequently, the memo succeeded in reducing regulation issued in the period with less political accountability.

The deadlines announced in the Bolten memo provide a useful marker for what the administration expected to accomplish as a normal course of business within its term. According to Susan Dudley, the OIRA administrator at the time, the administration made a few exceptions to its self-imposed moratorium on issuing final regulations during the midnight period.³⁴ Understandably, the exceptions included the rules facing statutory or judicial deadlines, since agencies do not control the rules' timing in these cases. The administration also allowed agencies to finalize the rules proposed before the June 1, 2008 deadline. In these cases, agencies announced their intentions to regulate sufficiently in advance and provided the public with ample opportunity to comment on these rules. Agencies would likely have issued these regulations regardless of the election cycle. The final category of exceptions included rules that reflected presidential priorities. It is this category of midnight rules that was most likely politically motivated.

Out of 28 economically significant regulations finalized during the Bush midnight period, this study identified ten regulations that were proposed after the administration's June 1, 2008 deadline (see Table 1).³⁵ The fact that most economically significant midnight regulations were proposed at least six months before the end of term provides indirect support to the ACUS report's claim that midnight regulatory surge results mostly from the agencies' natural tendency to work to a deadline. This study, however, focuses on the non-trivial number of the remaining "rushed" midnight regulations.

Note that the surge typically includes hundreds of regulations but that most of them are not major. The study focuses on economically significant regulations for two reasons. First, they can impose substantial regulatory costs on the economy. Second, given their higher impact on the economy, they are subject to more stringent analytical requirements and are reviewed by OIRA. Since the regulatory surge may undermine OIRA's ability to exert effective oversight, it is illuminating to examine the midnight regulations' analysis quality.

Four of the ten "rushed" regulations faced statutory deadlines—another common category that was excepted from the Bolten memo's restrictions. In addition, the list includes four budget regulations. In

³⁰ McLaughlin, "The Consequences of Midnight Regulations and Other Surges in Regulatory Activity."

³¹ Susan E. Dudley, "Observations on OIRA's Thirtieth Anniversary," *Administrative Law Review* 63, no. Special Edition (2011): 113–29.

³² *Ibid.*; Beermann, *Midnight Rules*.

³³ Beermann, *Midnight Rules*.

³⁴ Susan E. Dudley, "Regulatory Activity in the Bush Administration at the Stroke of Midnight," *Engage* 10, no. 2 (2009): 27–29.

³⁵ Data from OIRA database available at reginfo.com.

contrast to traditional prescriptive regulations, budget regulations implement federal spending and revenue laws. For example, each year the Department of Health and Human Services issues regulations recalculating Medicare payment rates. There is some evidence that OIRA tends to treat budget regulations differently. Rather than review budget regulations’ economic analysis, OIRA focuses primarily on their impact on the federal budget.³⁶

Table 1. Final Midnight Regulations Proposed after June 1, 2008

Rule	Regulatory Report Card Score (max = 60 points)
Investment Advice – Participants and Beneficiaries RIN: 1210-AB13	40 / 60 (67%)
*Energy Conservation for Commercial Freezers and Refrigerators RIN: 1904-AB59	34 / 60 (57%)
<i>HIPAA Code Sets</i> <i>RIN: 0938-AN25</i>	33 / 55 (55%)
*Refuge Alternatives for Underground Coal Mines RIN: 1219-AB58	28 / 60 (47%)
* <i>Changes to the Outpatient Prospective Payment System</i> <i>RIN: 0938-AP17</i>	27 / 60 (45%)
Oil Shale Management – General RIN: 1004-AD90	26 / 60 (43%)
HIPAA Electronic Transaction Standards RIN: 0938-AM50	25 / 60 (42%)
Employment Eligibility Verification RIN: 9000-AK91	24 / 60 (40%)
<i>Abandoned Mine Land Program</i> <i>RIN: 1029-AC56</i>	21 / 60 (35%)
* <i>Medicare Program: Revisions to Physician Fee Schedules</i> <i>RIN: 0938-AP18</i>	17 / 60 (28%)

*Statutory deadlines. **Judicial deadlines.

Regulations in italics are budget or transfer regulations.

The right column in Table 1 shows each rule’s Regulatory Report Card score, indicating the quality of the rule’s RIA. The Mercatus Center at George Mason University has developed Regulatory Report Card as a qualitative framework to assess the quality and use of regulatory analysis in federal agencies.³⁷ The Report Card evaluates the rule’s RIA based on 12 criteria (see Appendix I), each scored on a 0–5 scale. Thus, an RIA can receive a maximum of 60 points.

The Report Card data indicated that the regulatory analysis quality is generally low even outside the midnight period.³⁸ Regulations issued in 2008–2010 received an average score of 28 out of 60 points maximum. The average score, however, hides variation in scores based on the type of regulation.

³⁶ McLaughlin and Ellig, “Does OIRA Review Improve the Quality of Regulatory Impact Analysis?”

³⁷ Jerry Ellig and Patrick A. McLaughlin, “The Quality and Use of Regulatory Analysis in 2008,” *Risk Analysis* 32, no. 5 (2012): 855–80.

³⁸ Ellig, McLaughlin, and Morrall III, “Continuity, Change, and Priorities.”

Budget regulations score substantially lower than prescriptive regulations. In the Bush administration's final year, budget regulations scored an average of 18 points, while prescriptive regulations received an average of 33 points.

Of the ten "rushed" midnight regulations, prescriptive regulations scored 29 points, while budget regulation scored 25 points on average. Compared to the average score for 2008, budget regulations had better analysis, while prescriptive regulations fared worse. The four budget regulations scored either at or above average for budget regulations. In fact, Patrick McLaughlin and Jerry Ellig observed that midnight period has little impact on regulatory analysis quality for budget regulations.³⁹ In contrast, only two prescriptive regulations scored above average for prescriptive regulations. The remaining regulations scored substantially below average. Incidentally, the midnight regulations that were proposed before the June 1 deadline had scores comparable to those for non-midnight regulations proposed in 2008.⁴⁰ Thus, it was the "rushed" prescriptive midnight regulations that had poor analytical quality. Let's examine a few of them in more detail.

Oil Shale Management – General, RIN: 1004-AD90

Proposed on July 23, 2008 by the Department of the Interior's Bureau of Land Management (BLM), the rule allowed commercial leasing of federal lands for oil shale exploration.⁴¹ At the time, it was subject to significant controversy and political wrangling, which continued under the Obama administration.

Oil shale is a sedimentary rock containing kerogen, a precursor to oil. Kerogen is not a perfect substitute for crude oil; it is less suited to produce gasoline. Instead, it is better suited for production of middle-distillates, such as jet fuel or diesel. Oil shale's main advantage is its abundance in the United States. Recent estimates put U.S. potentially recoverably oil shale reserves at 1.5 trillion barrels, most of it on federally held land in the Mountain West.⁴² By comparison, Saudi Arabian proven conventional oil reserves are estimated at 267 billion barrels.⁴³ A recent rise in energy prices led to a renewed interest in oil shale.

Oil shale extraction poses unique technological and environmental challenges. First is the cost. While oil shale was known as a potential source of energy for decades, it was long viewed as uneconomical to produce. In the 1970s, rising oil prices briefly encouraged commercial interest in oil shale exploration, yet a significant drop in oil prices in the 1980s made oil shale once again economically unviable.⁴⁴ Current interest in oil shale production is similarly spurred by record high energy prices and desires to

³⁹ McLaughlin and Ellig, "Does OIRA Review Improve the Quality of Regulatory Impact Analysis?"

⁴⁰ Ibid.

⁴¹ Department of the Interior, Bureau of Land Management, "Oil Shale Management - General; Proposed Rule," *Federal Register* 73, no. 142 (July 23, 2008): 42926-75.

⁴² Anthony Andrews, *Oil Shale: History, Incentives, and Policy*, CRS Reports (Washington, DC: Congressional Research Service, April 13, 2006).

⁴³ Ibid.

⁴⁴ Ibid.

reduce American dependence on foreign oil.⁴⁵ In addition, recent technological advances may have substantially reduced extraction costs.

The second challenge is environmental. Kerogen is bound up in the shale and needs to be extracted through either above ground or in situ retorting (a high temperature destructive distillation process in the absence of oxygen). The above ground process involves underground or open-pit mining to excavate shale, which is then retorted in large kilns. The in situ process involves mining an underground retorting chamber. Both processes require large amounts of water, a relatively scarce resource in the Mountain West.⁴⁶ In addition to the extensive water demand, used shale needs to be disposed in the above ground process, while in situ process could potentially contaminate groundwater.⁴⁷

Rising energy prices in the 2000s prompted a Republican-led Congress to adopt the Energy Policy Act (EP Act) of 2005, which aims, among other things, at developing oil shale, tar sands, and other unconventional fuels.⁴⁸ Section 369 of the act directed the Department of Interior (DOI) to lease federal lands to oil companies for research and development of oil shale technologies, to complete a Programmatic Environmental Impact Statement (PEIS) for commercial leasing of federal land for oil shale production, and to issue final regulation for commercial leasing program within six months of PEIS completion. In addition, the EP Act directed the Department of Defense to develop a strategy for greater use of unconventional fuels to meet its fuel demand.

Many congressional Democrats, including Colorado Senator Ken Salazar and Representatives John Salazar and Mark Udall opposed oil shale development due to water demand and environmental concerns.⁴⁹ Previous boom and bust cycles of oil shale development also made them wary of a potential repeat.⁵⁰ In contrast, Utah Republican Senators Orin Hatch and Bob Bennett voiced strong support for oil shale exploration.⁵¹ A similar split existed between Utah's Republican governor John Huntsman Jr. and Colorado's and Wyoming's Democratic governors Bill Ritter and Dave Freudenthal.⁵²

In 2007, after Democrats acquired majority control in the Senate, Senator Salazar inserted a rider into following year's Consolidated Appropriations Act prohibiting DOI from using federal funds to issue final leasing regulations for oil shale development.⁵³ The provision established a yearlong oil shale moratorium. It also prevented DOI from completing PEIS, since the agency was required by the EP Act to issue a final regulation within six months of publishing the programmatic statement. Similarly, section 526 of the Energy Independence and Security Act of 2007 restricted the federal agencies from procuring

⁴⁵ Anthony Andrews, *Developments in Oil Shale*, CRS Reports (Washington, DC: Congressional Research Service, November 17, 2008).

⁴⁶ Government Accountability Office, *Impacts of Potential Oil Shale Development on Water Resources* (Washington, DC: Government Printing Office, August 24, 2001).

⁴⁷ Andrews, *Oil Shale*.

⁴⁸ *Energy Policy Act of 2005*, Pub. L. No 109-58, 109 Stat. 594, 2005.

⁴⁹ Jim Moscou, "America's Untapped Oil: Could the Rockies Out-produce Saudi Arabia?," *The Daily Beast*, July 13, 2008, <http://www.thedailybeast.com/newsweek/2008/07/13/america-s-untapped-oil.html>.

⁵⁰ Ken Salazar, "Heedless Rush to Oil Shale," *Washington Post*, July 15, 2008, sec. A-19.

⁵¹ Moscou, "America's Untapped Oil."

⁵² *Ibid.*

⁵³ *Ibid.*

unconventional fuels whose lifecycle emissions exceeded those of conventional petroleum based fuels.⁵⁴ The statute could have broad implications given that the Department of Defense is a major consumer of jet fuel, a common oil shale product.

The rapidly rising gas prices during the 2008 election year once again changed the political dynamic of oil shale production. In July of that year, President Bush rescinded an executive moratorium on offshore oil drilling.⁵⁵ Soon after, DOI issued a proposed rule on oil shale management in anticipation that high gas prices would pressure Congress to let the oil shale moratorium expire.⁵⁶ The agency argued that while it could not use federal funds to issue a final rule, the moratorium did not preclude it from proposing the rule.⁵⁷ The agency's calculation proved to be correct. Despite Senator Salazar's efforts, Congress did not extend the moratorium, and it expired in October 2008.⁵⁸ On November 17, ten days after the presidential elections, DOI issued a final Oil Shale Management rule to take effect on January 17, 2009.⁵⁹ The new administration took office three days after the rule came into force.

President Obama nominated Senator Salazar to serve as Secretary of DOI in the new administration.⁶⁰ Yet despite his opposition to oil shale development, Salazar's ability to change the rule that had already gone into effect was constrained by the regulatory process. Any modifications to the rule would have to go through the same lengthy and costly process as the original. In the meantime, the agency would have to start enforcing the original rule.

In the end, an external challenge aided Secretary Salazar's attempts to change the rule in accordance with the new administration's preferences. On January 16, 2009, a day before the rule took effect, an environmentalist coalition filed a lawsuit against DOI for allegedly violating the National Environment Policy Act and Endangered Species Act in its rulemaking.⁶¹ The rule's effective date got delayed due to pending lawsuit. The agency settled the lawsuit and agreed to reconsider the terms of the commercial leasing program outlined in the Oil Shale Management rule.⁶² On May 16, 2012, DOI sent a revised Oil Shale Management rule for OIRA review.⁶³

⁵⁴ *Energy Independence and Security Act of 2007*, Pub. L. No 110-40, 121 Stat. 1492, 2007.

⁵⁵ Marc Humphries, Robert Pirog, and Gene Whitney, *U.S. Offshore Oil and Gas Resources: Prospects and Processes*, CRS Reports (Washington, DC: Congressional Research Service, April 26, 2010).

⁵⁶ Anne C. Mulkern, "Oil Shale Debate Moves West," *Denver Post*, July 23, 2008, sec. A-01; Department of the Interior, Bureau of Land Management, "BLM Identifies Lands for Potential Development of Significant Oil Shale Resources," *Department of the Interior, Bureau of Land Management*, September 4, 2008, http://www.blm.gov/wo/st/en/info/newsroom/2008/september/NR_09_04_2008.html.

⁵⁷ Department of the Interior, Bureau of Land Management, "Oil Shale Management - General; Proposed Rule."

⁵⁸ Joaquin Sapien, "Bush Oil Shale Rules Roil Mountain West," *Politico*, November 22, 2008, <http://www.politico.com/news/stories/1108/15874.html>.

⁵⁹ Department of the Interior, Bureau of Land Management, "Oil Shale Management - General; Final Rule," *Federal Register* 73, no. 223 (November 18, 2008): 69413-87.

⁶⁰ Brian Knowlton and Jeff Zeleny, "Obama Names Picks for Agriculture and Interior," *New York Times*, December 17, 2008, <http://www.nytimes.com/2008/12/18/us/politics/w18cabinet.html>.

⁶¹ *Colorado Environmental Coalition Et Al V. Kempthorne Et Al*, 1:2009cv00085 (Colorado District Court 2011).

⁶² Gary Gentile, "Prompted by Greens, Interior to Review Bush-Era Policies on Western Oil Shale," *Inside Energy with Federal Lands*, February 21, 2011.

⁶³ Search OIRA website reginfo.gov for RIN: 1004-AE28.

The political wrangling over oil shale demonstrates how an outgoing administration could push through a controversial rule strongly opposed by the other party during the midnight period. It was clear that the rule would stall once a Democratic president took the office. Outgoing Secretary of the Interior Dirk Kempthorne, a strong proponent of oil shale extraction, moved swiftly to issue both the PEIS and a final rule before the clock ran out on Inauguration Day. While the Obama administration tried to slow down the implementation of the rule, it was nonetheless obliged to go ahead with it. Thus, even under President Obama, the federal oil shale policy reflected the preferences of the Bush administration.

A common charge against midnight regulations, in addition to lack of political accountability, is their low analytical quality. The rule that is rushed and strongly politically motivated is unlikely to be subject to the same rigorous analysis and oversight that is typical of the regulatory process. The Oil Shale Management rule's poor regulatory analysis quality seems to support this claim.

In contrast to many rules, DOI made it difficult to find the rule's analysis. Agencies typically make analysis easily accessible online either through their departmental website or through regulations.gov, a centralized website that posts all regulation related documentation. The Oil Shale Management rule's RIA was not available online at the time the rule was proposed. The proposed rule directed individuals to contact the agency in order to receive a copy. Yet it took a few successive calls to the agency for the Mercatus Center to obtain a copy of the RIA. The agency mailed a hard copy as it did not have it in electronic format. Anyone interested in reviewing the agency analysis in order to submit a public comment would have found it exceedingly difficult.

Beyond making it hard for the public to access the rule's analysis, the agency failed to identify the problem that it aimed to resolve with its rulemaking. President Clinton's Executive Order 12866 calls on agencies to identify systemic problems that necessitate federal regulation.⁶⁴ Systemic problems may include either market failures, which indicate situations when markets fail to achieve efficient results, or government failures, which include problems created by previous government actions. The rule may also pursue larger social goals, which need to be clearly articulated.

The rule's statement of need simply cites congressional directive.⁶⁵ It does not specify what market or government failure the rule attempts to address. Even if an agency is required to regulate by Congress, a good RIA should always indicate what systemic failure it addresses.⁶⁶ Agencies have the expertise in the subject matter that Congress may lack. Thus, one of the RIA's goals is to inform Congress.⁶⁷ If an agency sees no systemic failure, it is its duty to say so, so that Congress can subsequently modify its requirements and correct the authorizing legislation. Although in this case, the systemic failure can be surmised from the context—the rule aims to correct a problem created by previous legislation that

⁶⁴ "Executive Order 12866."

⁶⁵ Department of the Interior, Bureau of Land Management, *Economic Analysis for the Final Commercial Oil Shale Management Regulations* (Washington, DC: Department of the Interior, Bureau of Land Management, 2008).

⁶⁶ Office of Management and Budget, *Circular A-4: Regulatory Analysis* (Washington, DC: Office of Management and Budget, 2003), http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf.

⁶⁷ Kenneth J. Arrow et al., "Is There a Role for Benefit-Cost Analysis in Environmental, Health, and Safety Regulation?," *Environment and Development Economics* 2, no. 2 (1997): 195–221.

prevented oil shale exploration on federal lands—it is left up to the reader to deduce. The RIA fails to explicitly state its objectives.

The regulation's RIA discusses only a limited range of alternatives mostly centered on different royalty schemes. It does not estimate the possibility of selling federal land rather than leasing. While there may be legal barriers to this option, the purpose of an RIA is to inform Congress of this as a possible option. In fact, Office of Management and Budget (OMB) Circular A-4, which outlines best regulatory analysis practices, explicitly directs agencies to consider a wide-range of options including those outside their current legal authority.⁶⁸ Thus, if careful analysis indicates that the best option is the one that an agency is currently not authorized to implement, Congress could use this information to modify the authorizing statute and allow the better option to be implemented. A good example of this practice is the Department of Energy's energy-efficiency regulations that routinely consider a wide-range of regulatory approaches, including issuing credits, rebates, or no regulation.⁶⁹

A crucial component missing from the RIA's discussion of alternatives is a baseline scenario analysis. The RIA does not explain what would happen if the agency did not lease land for oil shale development. The obvious outcome is that oil shale would not be explored, which would mean loss of potential royalties from commercial leases and loss of potential jobs and economic growth that would be generated by a thriving oil shale industry. Yet commercial lease royalties are not the only goal pursued by this rule. The rule attempts to provide energy companies with incentives to develop oil shale extraction technologies by leasing oil shale rich lands. Much of the oil shale technology is unproven and in need of further research and development in order to be economically viable. The rule does not examine whether that goal would be hindered if energy companies did not have access to federal lands and had to rely primarily on access to private lands.

The rule's broader objectives include lower energy costs and energy independence.⁷⁰ Yet the RIA does not discuss how the rule would serve either of those goals. Specifically, the baseline scenario, had it been included in the RIA, would project the future energy costs in the absence of oil shale development. Then the analysis of alternatives would estimate the impact of oil shale development on the energy costs. The current high extraction costs for oil shale and consequently high prices at which it becomes economically viable raise questions regarding the rule's ability to meet its lower energy cost objective. Similarly, the fact that oil shale distillates are not well suited for gasoline production casts doubt on the rule's ability to aid the country's energy independence.

In the analysis of alternatives, the RIA did not adequately address the social and environmental impacts of intensive water use. The RIA merely states that water issues may arise, yet provides no estimates of the oil shale industry's potential water needs. The agency claims that uncertainty around technology and industry's potential size makes water demand estimation extremely difficult. Since a domestic oil

⁶⁸ Ibid.

⁶⁹ James Broughel and Jerry Ellig, *Regulatory Alternatives: Best and Worst Practices*, Mercatus on Policy (Mercatus Center, George Mason University, February 21, 2012).

⁷⁰ These broader objectives have to be deduced by the reader as the RIA simply quotes Section 369 point (b) of the authorizing statute EP Act of 2005 in its statement of need for the rule.

shale industry does not exist, any projections regarding oil shale development viability are challenging. Yet these challenges did not stop BLM from assessing, however imperfectly, the base case oil shale production projections. The same challenges that plague the task of forecasting future water demand are present in the estimates of future oil shale production. Yet BLM found ways to overcome uncertainty and insufficient data issues for production estimates; it could do the same for water demand. In fact, the Government Accountability Office (GAO) issued a report addressing this issue.⁷¹ The report found that while water estimates vary widely and differ by technology, minimum, maximum, and average estimates exist for both in situ and surface retorting operations. In addition, the report found that water availability might hinder the oil shale industry's development.

Water is a particularly scarce resource in Western states, and water rights are traded openly in markets.⁷² Oil companies claim that they own sufficient water rights for oil shale production, yet, if necessary, they would purchase additional water rights.⁷³ Historically, senior water rights, which give owners priority in water use, are owned mostly by farms. As a result, most water rights sales convert use from agricultural to municipal or industrial ends.⁷⁴ Since agricultural uses are priced considerably lower, the conversion of use may lead to higher water prices. In fact, median prices for water rights (both leasing and outright sale) have been rising over the last two decades.⁷⁵ Ramped up demand for water from the oil shale industry, in addition to increased municipal demand from growing population, is likely to accelerate the trend further. The trend could result in higher production costs for farmers and higher municipal water bills for consumers. Time and again, public comments cited water availability as a major concern for oil shale development. Yet the agency chose to treat the subject lightly and provide only a superficial discussion of potential water issues.

Finally, the RIA did not specify how it plans to monitor the rule's progress in achieving its objectives or what metrics it plans to use. Given the high level of technological and economic uncertainty around oil shale extraction, monitoring the rule's progress is crucial. As BLM indicated, its original analysis was hampered by high level of uncertainty and lack of relevant data. It would only seem logical for the agency to put effort into collecting the necessary data as the rule moved forward. Additional data would allow the agency and, if necessary, Congress to step in and correct the regulation to make it more efficient.

⁷¹ Government Accountability Office, *A Better and Coordinated Understanding of Water Resources Could Help Mitigate the Impacts of Potential Oil Shale Development* (Washington, DC: Government Printing Office, October 29, 2010), <http://www.gao.gov/assets/320/311896.pdf>.

⁷² Zachary Donohew, "Property Rights and Western United States Water Markets," *Australian Journal of Agricultural and Resource Economics* 53, no. 1 (2009): 85–103.

⁷³ Government Accountability Office, *A Better and Coordinated Understanding of Water Resources Could Help Mitigate the Impacts of Potential Oil Shale Development*.

⁷⁴ Jedidiah Brewer et al., "Water Markets in the West: Prices, Trading, and Contractual Forms," *Economic Inquiry* 46, no. 2 (2008): 91–112.

⁷⁵ *Ibid.*; Thomas C. Brown, "Trends in Water Market Activity and Price in the Western United States," *Water Resources Research* 42, no. W09402 (2006): 1–14.

Employment Eligibility Verification, RIN: 9000-AK91

Proposed on June 12, 2008, the rule amended the Federal Acquisition Regulation to require federal contractors and subcontractors to verify employment eligibility of new hires and current employees using E-Verify, an Internet-based system administered by the U.S. Citizenship and Immigration Services.⁷⁶ The rule was part of the Bush administration's larger, politically contentious efforts at comprehensive immigration reform.

During the Bush administration, Congress made several attempts to strengthen immigration enforcement. The most notable effort came during 109th congressional session, when both the House and Senate introduced parallel immigration reform bills: Senate bill S.2611 "Comprehensive Immigration Reform Act of 2006"⁷⁷ and House bill H.R. 4437 "Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005."⁷⁸ Section 301 of the Senate bill included provisions requiring implementation and compliance with E-Verify. Similarly, Section 701 of the House bill made E-Verify mandatory three years after the bill's enactment. While both bills included strong enforcement provisions, they differed markedly in their approach to illegal immigrants currently residing in the country. The Senate version provided for a path to citizenship for illegal immigrants that many conservatives decried as amnesty. The House version had no such provision and focused primarily on enforcement measures. The two chambers of Congress failed to resolve their disagreements over the path to citizenship provisions, which ultimately prevented either bill from moving forward.⁷⁹

Following midterm elections in 2006, Democrats regained control of both chambers of Congress. With stronger Democratic support, the Senate revived its attempt to pass a comprehensive immigration reform in 2007.⁸⁰ Yet hopes for passage were quickly dashed in the face of stiff opposition from within the Republican Party despite the Bush administration's strong support for the bill. This time the bill did not even pass the Senate.

The congressional failure to pass a comprehensive immigration reform left the Bush administration in an awkward position. Not only did the reform's most contentious piece—the status of over 12 million illegal immigrants residing in the United States—remain unresolved, but the enforcement provisions contained in the bill were also scuttled. In order to proceed, the administration changed its tactics to salvaging individual pieces of the reform bill, including expanded E-Verify use, that were a high priority for the Bush administration. At a press conference in August 2008, following the Senate's failure to pass the immigration reform bill, Homeland Security Secretary Michael Chertoff declared, "Until Congress

⁷⁶ General Services Administration, "Federal Acquisition Regulation; FAR Case 2007-013, Employment Eligibility Verification - Proposed Rule," *Federal Register* 73, no. 114 (June 12, 2008): 33374-81.

⁷⁷ Comprehensive Immigration Reform Act of 2006, S.2611, 109th Cong., (2006)

⁷⁸ Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005).

⁷⁹ Ruth Ellen Wasem, *Immigration Reform: Brief Synthesis of Issue*, CRS Reports (Washington, DC: Congressional Research Service, May 10, 2007).

⁸⁰ Alan Greenblatt, "Immigration Debate: Can Politicians Find a Way to Curb Illegal Immigration?," *CQ Researcher*, February 1, 2008.

chooses to act, we're going to take some energetic steps of our own.”⁸¹ In his testimony before the Senate’s Committee on the Judiciary, Secretary Chertoff outlined a range of the administration’s law enforcement initiatives aimed at stemming the flow of illegal immigrants.⁸² These initiatives included an OMB memo instructing federal agencies to use E-Verify to screen newly hired employees;⁸³ a controversial regulation that revised the steps employers must take when they receive a “no-match” letter from the Social Security Administration (SSA);⁸⁴ and the Employment Eligibility Verification rule discussed in this section.

On June 6, 2008, President Bush issued Executive Order 13465 directing federal agencies to require their contractors and subcontractors to use an electronic verification system.⁸⁵ Six days later, the Department of Defense, General Services Administration, and National Aeronautics and Space Administration jointly proposed a rule requiring federal contractors and subcontractors to verify their employees’ legal work authorization through E-Verify.⁸⁶ The final rule was published on November 14, 2008, ten days after the presidential elections.

Despite the rule’s unpopularity with pro-immigrant groups, its strongest opposition came from business interests. The U.S. Chamber of Commerce, a trade association representing business interests, complained that the rule was too costly to implement and would have negative impacts on many businesses. On December 23, 2008, the U.S. Chamber filed a lawsuit with the U.S. District Court for the District of Maryland that challenged the rule’s legality.⁸⁷ The U.S. Chamber claimed that the executive branch exceeded its authority by circumventing the federal immigration and procurement laws through the use of an executive order.⁸⁸ Due to pending lawsuit, the rule’s effective date was delayed four

⁸¹ Department of Commerce, “U.S. Secretary of Homeland Security Michael Chertoff, U.S. Secretary of Commerce Carlos M. Gutierrez, Immigration Reform Press Conference, Washington, D.C.,” *Department of Commerce, Secretary’s Speeches*, August 10, 2007, http://2001-2009.commerce.gov/NewsRoom/SecretarySpeeches/PROD01_003257.html.

⁸² Oversight of the Department of Homeland Security, Hearing before the Senate Committee on the Judiciary, 110th Cong. (2008) (statement of Michael Chertoff, Secretary, Department of Homeland Security).

⁸³ Stephen S. McMillin, *Verifying the Employment Eligibility of Federal Employees*, Memorandum for the Heads of Departments and Agencies (Washington, DC: Office of Management and Budget, August 10, 2007).

⁸⁴ SSA sends “no-match” letters to employers when their employees’ personal information does not match SSA records. The proposed regulation would count the receipt of “no-match” letter as evidence of the employer’s knowledge of an employee’s potentially illegal status. It further encouraged employers to turn over suspected employees to immigration authorities. The rule was blocked by courts and ultimately rescinded by the Obama administration. See Kimberly Fox, “Building on a Broken Employer Sanction System: The Impact of the Bush Administration’s SSA No-Match Letter Proposal,” *Harvard Law & Policy Review* 3 (2009): 203–20.

⁸⁵ “Executive Order 13465: Economy and Efficiency in Government Procurement through Compliance with Certain Immigration and Nationality Act Provisions and Use of an Electronic Employment Eligibility Verification System,” *Federal Register* 73, no. 113 (June 11, 2008): 33285–7.

⁸⁶ General Services Administration, “Federal Acquisition Regulation; FAR Case 2007–013, Employment Eligibility Verification - Final Rule,” *Federal Register* 73, no. 221 (November 14, 2008): 67651–705.

⁸⁷ U.S. Chamber of Commerce, “U.S. Chamber Lawsuit Challenges Massive Extension of E-Verify Program to Federal Contractors,” *U.S. Chamber of Commerce*, December 23, 2008, <http://www.uschamber.com/press/releases/2008/december/us-chamber-lawsuit-challenges-massive-extension-e-verify-program-federa>.

⁸⁸ *Ibid.*

times.⁸⁹ However, on August 26, 2009, the District Court judge ruled in favor of the federal government, allowing the rule to move forward.⁹⁰ The rule took effect on September 8, 2009.⁹¹

While the District Court affirmed the agency's authority to regulate, the agency was not forced to regulate by a congressional statute. The rule's implementation was at the agency's discretion. Given the Democratic Party's opposition to an enforcement-only approach, the rule would likely have stalled under the incoming Obama administration. Yet the Obama administration found it harder to repeal an existing regulation, especially at the time when the public mood was turning increasingly hostile toward illegal immigration.⁹² Consequently, the outgoing Bush administration was able to impose its preferred policy on its successor.

Similar to the Oil Shale Management rule, the Employment Eligibility Verification rule had below average analytical quality. The rule's RIA offered little evidence that the rule was in fact necessary. The RIA argued that E-Verify improved considerably on the existing employment eligibility verification process and that its mandatory use was necessary to reduce employment of unauthorized workers by federal contractors. Prior to the rule's promulgation, federal contractors could already enroll in E-Verify voluntarily, yet many chose not to enroll. The RIA argued that low enrollment levels resulted from the fact that hiring illegal immigrants presents low costs relative to legal workers. There are two types of costs that employers face when hiring illegal immigrants: (1) criminal charges facing employers who knowingly hire unauthorized workers; (2) disruptions in staffing and production if worksite enforcement efforts discover unauthorized workers employed by a contractor knowingly or unknowingly. The RIA argued that contractors did not fully internalize these costs since they could pass them on to the federal government. In addition, some contractors estimated that the likelihood of worksite enforcement action was too low to justify the costs of E-Verify enrollment.

While the RIA's argument seems logical, it fails on two accounts. First, the RIA failed to estimate the extent of the problem, i.e., how many unauthorized workers were employed by federal contractors and went undetected through the current verification process. Since the rule's primary benefit is to reduce the number of unauthorized workers employed by federal contractors, lack of such an estimate makes it impossible to measure the rule's benefits. The rule proposed to devote substantial resources (both private and public) to implement E-Verify. Supplying the lawmaker and the general public with even a rough estimate of the problem's magnitude would allow them to make a sound judgment as to whether such expense was justified.

Second, the RIA failed to provide evidence justifying the need to mandate E-Verify's use. The latter issue stems from the agencies' failure to estimate a baseline scenario. In a baseline scenario, agencies offer their best estimate of what the world would look like if they chose not to regulate. Note that a baseline

⁸⁹ Search regulations.gov for RIN 9000-AK91.

⁹⁰ *Chamber of Commerce V. Napolitano*, AW-08-3444 (Maryland District Court 2008).

⁹¹ General Services Administration, "Federal Acquisition Regulation; FAR Case 2007-013, Employment Eligibility Verification - Delay of Effective and Applicability Dates," *Federal Register* 74, no. 107 (June 5, 2009): 26981.

⁹² Greenblatt, "Immigration Debate."

scenario does not simply refer to the current state of affairs. Rather, it entails estimating how the situation will evolve given ongoing changes and trends.

In the case of the Employment Eligibility Verification rule, the RIA implied that current E-Verify enrollment levels were low and assumed that they would remain low in the future in the absence of regulation. However, the number of employers registered with E-Verify grew rapidly even prior to this rule. From January 2006 to January 2009 (eight months before the rule took effect), E-Verify enrollment expanded from 5,300 employers representing 23,000 hiring sites to 103,000 employers representing 414,000 hiring sites⁹³ —an almost twenty-fold increase in only three years. A continuing trend of voluntary E-Verify enrollment would significantly reduce any benefits (and incidentally costs) derived from mandating its use, casting doubt on the need for this rule.

Any estimate of the benefits derived from increased E-Verify enrollment should also consider its vulnerability to identity fraud. As a GAO report points out, the system was not designed for fraud detection.⁹⁴ It relies on social security numbers for verification. While it catches undocumented workers unable to produce evidence of their legal right to work in the country, it is less efficient against identity theft where unauthorized workers use documents stolen from persons authorized to work. The system is also vulnerable to employer fraud when employers use the same identity documents to authorize multiple workers. These problems reduce the benefits of mandatory E-Verify enrollment and should be taken into account when compared to the baseline scenario's benefits.

Beyond overlooking the baseline scenario, the rule considered only the narrowest range of alternatives. The two options the rule considered included the preferred option requiring all employees to be verified through the system and a narrower option limiting the verification requirement to newly hired employees. Yet even in his testimony before Senate Committee on the Judiciary, Homeland Security Secretary Chertoff outlined a wider range of immigration enforcement alternatives.⁹⁵ For example, he urged Congress to increase penalties for employers who knowingly hire unauthorized workers. A variation of this approach would increase fines for employers violating immigration-related employment practices or establish a new penalty for unauthorized workers falsifying their employment eligibility documents. Another alternative suggested by Secretary Chertoff would increase data sharing among the Department of Homeland Security (DHS), SSA, and employers in order to detect identity fraud.

Finally, an obvious option overlooked by the RIA was to increase resources available to DHS for worksite enforcement. As the RIA stated, contractors' costs of not enrolling in E-Verify were too small due to the low probability of DHS enforcement action. Increasing the DHS's enforcement resources would increase contractors' costs of hiring unauthorized workers, thereby convincing more contractors to enroll in E-Verify voluntarily. Other alternatives include providing contractors with incentives to enroll, establishing

⁹³ Andorra Bruno, *Unauthorized Employment in the United States: Issues, Options, and Legislation*, CRS Reports (Washington, DC: Congressional Research Service, March 2, 2009), 4.

⁹⁴ Government Accountability Office, *Employment Verification: Challenges Exist in Implementing a Mandatory Electronic Verification System* (Washington, DC: Government Printing Office, June 7, 2007), <http://www.gao.gov/new.items/d07924t.pdf>.

⁹⁵ "Comprehensive Immigration Reform," Hearing before the Senate Committee on the Judiciary, 110th Cong. (2007) (statement of Michael Chertoff, Secretary, Department of Homeland Security).

a centralized document verification system, or shifting focus to enforcement of workplace protections.⁹⁶ Various combinations of these alternatives could also be considered.

To the agency's credit, the rule goes into considerable detail to identify all possible costs incurred by the federal contractors and the federal government to implement the rule. In addition, the rule includes a thorough sensitivity analysis to estimate the uncertainty levels in the rule's costs calculations. However, there is no commensurately detailed discussion of the rule's benefits. Consequently, there is little basis for the agency's decision to proceed with its preferred option instead of the only alternative it has considered or the additional alternatives outlined above.

OMB Circular A-4 instructs agencies to calculate the costs and benefits of a wide range of alternatives and choose the option that maximizes the rule's net benefits (benefits minus costs).⁹⁷ When putting monetary value on benefits is difficult, agencies can opt for cost-effectiveness analysis (CEA) instead. In the latter case, agencies still have to measure policy outcomes but do not have to translate them into monetary terms. The benefits achieved under each regulatory alternative are then divided by the alternative's costs in order to estimate its effectiveness in achieving desired outcomes.

The rule's main goal is to reduce the level of unauthorized employment among federal contractors. Understandably, the RIA may find it challenging to put a monetary value on the enforcement of immigration laws, making benefit-cost analysis less applicable. Yet policy outcomes can be readily measured in terms of reductions in unauthorized employment. A properly constructed RIA would have measured the extent to which each alternative reduced unauthorized employment and at what cost. Thus, it would be in a position to choose the most effective method of enforcing immigration laws. As written, however, the RIA provides no basis for choice among alternatives. The RIA seems to be written to justify a preferred option instead of genuinely comparing alternatives and choosing the most efficient one.

Investment Advice – Participants and Beneficiaries, RIN: 1210-AB13

The Investment Advice rule, proposed on August 22, 2008, increased access to financial advice for many participants in defined contribution (DC) plans, such as 401(k) plans, and individual retirement accounts (IRA).⁹⁸ The Department of Labor (DOL) claimed that access to financial advice could significantly improve investment decisions and increase returns for retirement plan participants. Consequently, the rule would result in substantial benefits for DC and IRA plan participants.

Previously, under the Employee Retirement Income Security Act (ERISA), financial advisors who had a direct or indirect stake in participants' investment decisions were barred from providing financial advice to safeguard against conflict of interest.⁹⁹ However, Congress recognized that prohibitions under ERISA were too restrictive and deprived many DC and IRA plan participants of valuable financial advice. In

⁹⁶ Bruno, *Unauthorized Employment in the United States*.

⁹⁷ Office of Management and Budget, *Circular A-4*.

⁹⁸ Department of Labor, "Investment Advice—Participants and Beneficiaries; Proposed Rule," *Federal Register* 73, no. 164 (August 22, 2008): 49896–923.

⁹⁹ *Ibid.*

2006, Congress enacted Pension Protection Act (PPA) that included statutory exemptions for some transactions prohibited by ERISA.¹⁰⁰

When Republican Representative John Boehner, then chairman of the House Education and the Workforce Committee, first introduced PPA in 2005, committee Democrats expressed concern that ERISA exemptions would allow for conflict of interest in investment advice.¹⁰¹ To safeguard against potential abuse in fiduciary advising, Democrats proposed amendments restricting the exemption language or striking down exemptions altogether.¹⁰² The Republican majority rejected both amendments. The committee voted to report the bill to the House along the party lines with the Republican majority voting in favor and Democrats opposing the bill.¹⁰³ Ultimately, the bill passed with bipartisan support in both chambers of Congress. The bill, a major pension reform, dealt with many pressing issues, and investment advice provisions constituted only a small part of the overall bill.

The PPA allowed plan fiduciaries, i.e., firms managing retirement plans, to advise participants under two permissible arrangements: (1) through use of computer models, and (2) through fee-leveling.¹⁰⁴ Under the first arrangement, financial advice would be generated by certified computer models relying on widely accepted investment theories. Under the second arrangement, fiduciaries could furnish investment advice to plan participants on the condition that their direct or indirect compensation did not vary depending on the given advice. In other words, the fiduciary could not be in a position to self-deal at the plan participants' expense.

In its regulation implementing the PPA, DOL went beyond the statute's requirements. First, DOL interpreted the fee-leveling condition to apply to the persons hired by the fiduciaries to provide investment advice and the fiduciaries themselves. It exempted fiduciaries' affiliates from the fee-leveling requirement. Second, the agency issued a broader class exemption in addition to the statutory exemption.¹⁰⁵ In contrast to the statutory exemption, DOL's class exemption limited the fee-leveling conditions to persons providing investment advice, thereby exempting fiduciaries from the condition. In addition, it exempted advisors from the fee-leveling condition if plan participants requested an additional individualized investment advice after receiving computer model generated advice. Both provisions were subject to independent audits, disclosures, and recordkeeping to safeguard against conflict of interest on the part of fiduciaries and advisors.

¹⁰⁰ David A. Pratt, "Focus on . . . Investment Advice under the Pension Protection Act of 2006," *Journal of Pension Benefits* 14, no. 2 (2007): 42–47.

¹⁰¹ Pension Protection Act of 2005, Report to Accompany H.R. 2830, Report No. 109-232, 109th Cong. (2005).

¹⁰² *Ibid.*

¹⁰³ House Committee on Education and the Workforce, "Roll Call 7, Bill H.R. 2830," *House Committee on Education and the Workforce*, June 30, 2005,

<http://archives.republicans.edlabor.house.gov/archive/markups/109th/fc/hr2830/629rc7.pdf>.

¹⁰⁴ *Ibid.*

¹⁰⁵ Department of Labor, "Investment Advice—Participants and Beneficiaries; Proposed Rule."

While computer model generated investment advice caused little controversy, both statutory and class exemption came under strong criticism. The comments to the proposed rules were split.¹⁰⁶ Larger financial institutions and the U.S. Chamber of Commerce generally supported the rules. Critics included independent advisers and organizations representing labor unions and retirees. A few Congress members also expressed concerns.

Democratic Representative George Miller, who came to chair the Education and the Workforce Committee after Democrats took over control of Congress in 2006, voiced strong opposition to the proposed rules. Commenting on the proposed rule, Representative Miller claimed that the agency misinterpreted congressional intent when it decided against levying the fee-leveling condition on fiduciary's affiliates.¹⁰⁷ According to Miller, DOL overlooked the fact that fiduciary advisors and affiliates could be closely related and the profitability of affiliates could directly impact the profitability of the advisors, creating a conflict of interest. In addition, Miller claimed that the agency lacked statutory authority to propose class exemption, which he thought was too broad and led to conflict of interest. Consequently, he urged DOL to withdraw the rule.

In a separate letter, Senators Jeff Bingaman, Charles Grassley, and Edward Kennedy similarly voiced concerns over the proposed class exemption and lack of fee-leveling requirement on fiduciary affiliates.¹⁰⁸ They noted that the statutory exemption language included in the PPA resulted from a carefully constructed compromise aiming to balance the need for more financial advice with safeguards against biased advice. They similarly urged the agency to redraft the proposed rules to reflect the congressional intent.

The agency proceeded with the final regulation in the waning days of the Bush administration. DOL announced the publication of the final rule on January 16, 2009, which appeared in the Federal Register five days later.¹⁰⁹ The rule's effective date was scheduled for March 23 later that year.¹¹⁰ In the final rule, the agency acknowledged the concerns—particularly with regard to the class exemption and fee-leveling requirement for fiduciary affiliates—voiced in public comments. However, it chose not to alter its approach in the final regulation. The agency believed that its proposed regulation sufficiently addressed the potential conflict of interest concerns with financial advising.

Due in part to its timing, the Investment Advice regulation's fate differed from that of the Employment Eligibility Verification and Oil Shale Management regulations. Under the Congressional Review Act,

¹⁰⁶ Department of Labor, "Investment Advice – Participants And Beneficiaries NPRM, Public Comments," *Department of Labor*, n.d., <http://www.dol.gov/ebsa/regs/cmt-investment-advice.html>.

¹⁰⁷ George Miller and Rob Andrews, *Public Interest Comment on the Department of Labor's Investment Advice Regulations and Investment Advice Class Exemption* (House Committee on Education and Labor, October 8, 2008), <http://www.dol.gov/ebsa/pdf/cmt-10150802.pdf>.

¹⁰⁸ Jeff Bingaman, Edward M. Kennedy, and Charles E. Grassley, *Public Interest Comment on the Department of Labor's Investment Advice Regulations and Investment Advice Class Exemption* (United States Senate, October 6, 2008), <http://www.dol.gov/ebsa/pdf/cmt-10070825.pdf>.

¹⁰⁹ Department of Labor, "U.S. Labor Department Finalizes Rule on Investment Advice for 401(k) Plans and IRAs," *Department of Labor*, January 16, 2009, <http://www.dol.gov/ebsa/newsroom/2009/09-51-NAT.html>.

¹¹⁰ Department of Labor, "Investment Advice—Participants and Beneficiaries; Final Rule," *Federal Register* 74, no. 12 (January 21, 2009): 3822–53.

major regulations can take effect only 60 days after they are published.¹¹¹ As the Investment Advice rule was published later in the midnight period, it was scheduled to take effect under the new administration. On the day the Obama administration took office, White House Chief of Staff Rahm Emanuel issued a memo instructing agencies to delay the last minute regulations' effective date by an additional 60 days.¹¹² The delay would give the new administration time to review these regulations to ensure that they are in line with the administration's priorities. The Investment Advice rule was among the delayed regulations.

In addition to delaying the rule's effective date by 60 days, the agency opened it up for comments to allow the public an additional opportunity to raise their concerns with the regulation. The comments mostly reiterated concerns with the class exemption and lack of fee-leveling requirement for fiduciary affiliates. This time, however, the agency responded by delaying the rule for an additional 180 days and finally withdrawing the rule in November of that year.¹¹³ The agency reissued the rule in March of the following year. The new Investment Advice rule dropped the class exemption and extended the fee-leveling requirement to fiduciary advisors.¹¹⁴

In the wake of the financial crisis, the public grew more wary of the potential conflict of interest and self-dealing within the finance industry. Thus, it was relatively easy for the Obama administration to argue that the Bush administration's Investment Advice rule did not sufficiently guard ordinary investors against potential abuses on the part of fiduciary advisors.¹¹⁵ The new administration had to expend little political capital to issue a more restrictive rule. As a result, the final Investment Advice rule was in line with the Obama administration's preferences.

In another contrast with the two cases discussed above, the Investment Advice rule had above average analysis quality. While the congressional statute prompted the regulation, the agency nonetheless made a compelling case for regulation. It presented evidence of poor investment choices made by retirement plan participants without financial advice. It further demonstrated that better access to investment advice would lower the fees and taxes paid by plan participants. Investment advice would also improve their investment returns through timely portfolio revisions and diversification. In line with best regulatory analysis practices, the agency considered alternatives (e.g., class exemption) that went beyond the authorizing statute's requirements.

The agency acknowledged the potential for abuse of fiduciary responsibility on the part of financial advisors. Yet it decided that its proposed regulation provided sufficient safeguards against potential

¹¹¹ Morton Rosenberg, *Congressional Review of Agency Rulemaking: An Update and Assessment of the Congressional Review Act after a Decade*, CRS Reports (Washington, DC: Congressional Research Service, May 8, 2008).

¹¹² Executive Office of the President, "Memorandum for the Heads of Executive Departments and Agencies," *Federal Register* 74, no. 15 (January 26, 2009): 4435 –6.

¹¹³ Search OIRA website [reginfo.gov](http://www.reginfo.gov) for RIN: 1210-AB13

¹¹⁴ Department of Labor, "Investment Advice—Participants and Beneficiaries; Proposed Rule," *Federal Register* 75, no. 40 (March 2, 2010): 9360 –70.

¹¹⁵ Elayne Robertson Demby, "Putting Out Fires with Gasoline," *Plan Adviser*, February 2010, <http://www.planadviser.com/MagazineArticle.aspx?id=8922&magazine=8932>.

conflict of interest. The regulation's critics disagreed with the agency's judgment. In the agency's defense, the regulation's critics presented no evidence of widespread abuse of fiduciary responsibility, while the evidence presented by the agency in the RIA was mixed.¹¹⁶ Given the uncertainty surrounding the risk of self-dealing on the part of fiduciary advisors, it seems all the more important for the agency to track the regulation's outcomes and revise it if necessary. Yet the agency failed to establish plans to monitor the regulation's outcomes.

Political Motivation behind Bush Midnight Regulations

The picture that emerges from these case studies is nuanced. There is little evidence to suggest that agencies waited until the midnight period to issue these regulations in order to avoid political fallout. In each case, the administration's position on the issue was known well in advance. External factors rather than the agencies' deliberate delay explain the fact that agencies proposed these rules so late in the administration's term. For example, the Oil Shale Management rule was blocked by a congressional action until October 2008. Similarly, the Department of Homeland Security began to work on the Employment Eligibility Verification rule only after it became clear that Congress was unlikely to pass a comprehensive immigration reform. Finally, Congress passed the statute authorizing the Investment Advice rule late in the Bush administration's term.

However, it seems equally unlikely that the agencies rushed to finalize these regulations simply to avoid potential delays due to political transition. The Bolten memo, issued in an effort to curb the midnight regulatory surge, instructed agencies to leave the rules that were proposed after the June 1, 2008 deadline for the next administration to finalize. Yet the agencies sought exception to the administration's policy on midnight rules to ensure that the rules are finalized before the transition.

In all three cases, prominent Democrats opposed at least parts of these regulations. Agencies ran considerable chance that their rules would be stalled or considerably altered unless finalized under the outgoing administration. Their fears may have been justified. President Obama appointed Senator Ken Salazar, the main sponsor of the congressional moratorium on the Oil Shale Management rule, to head the Department of Interior. Representative George Miller, the vocal critic of the Investment Advice rule, was a strong contender for the Labor Secretary appointment.¹¹⁷ A new political appointee critical of the rule could put it on hold. Facing no statutory or judicial deadlines, these proposed rules could languish at the bottom of the agency's agenda for the entire term. Anticipating the incoming administration's opposition to the proposed rules, agencies ensured that the rules took effect before the new administration took over.

By finalizing these rules during the midnight period, agencies forced them on the incoming administration's agenda. Within the first few months in office, the new administration had to decide whether to expend political capital and resources to rescind or modify these rules or to leave them in

¹¹⁶ Jerry Ellig and Christina Forsberg, *Public Interest Comment on Investment Advice - Participants and Beneficiaries* (Mercatus Center, George Mason University, May 4, 2010), <http://www.dol.gov/ebsa/pdf/1210-AB35-035.pdf>.

¹¹⁷ Dan Morain, "Barack Obama's Labor Secretary Won't Be George Miller, Miller Says," *Los Angeles Times*, November 13, 2008, <http://latimesblogs.latimes.com/washington/2008/11/barack-obamas-l.html>.

place. Instead of focusing on its own agenda, the Obama administration was forced to deal with issues that were high priority for the outgoing Bush administration. In that regard, midnight regulations did impose the outgoing administration's preferences on its successor.

Yet forcing issues on the incoming administration does not ensure the outcome. In some cases, the incoming administration was able to take action and modify the midnight rules with relative ease. In other cases, however, it had to expend considerable political capital to shape the rule to fit its preferences and in the end chose not to. For example, in the wake of rising gas prices and a souring economy, the public mood supported the Bush administration's approach to oil shale exploration and immigration enforcement. Consequently, the incoming Obama administration found it difficult to withdraw these rules outright. For the Employment Eligibility Verification rule, the new administration had to essentially forfeit the fight and accept the rule written by the previous administration in its entirety. Similarly, the administration relied on the judicial challenge by the outside environmentalist groups in order to limit the Oil Shale Management rule's impact. In contrast, the financial crisis increased public support for more stringent financial regulation. Thus, the Obama administration was able to withdraw the Investment Advice rule and propose a new one shaped in accordance with its preferences.

Thus, it was not the complexity or cost of the rulemaking process that gave midnight rules their lasting power. Rather, the outgoing administration was able to set the agenda and force the incoming administration to take immediate action on these rules. Absent this constraint, the Obama administration could have strategically timed the regulatory action to avoid political costs.

In addition to differences in public support for these rules, the Obama administration's ability to stop or reverse midnight rules depended on their effective date. Economically significant rules cannot take effect earlier than 60 days after publication in the *Federal Register*. This means that only the rules published before November 20, less than two weeks after Election Day, could take effect before Inauguration Day.

The ability to delay the final rules' effective date is crucial for the incoming administration. The delay gives the new administration time to review midnight rules and decide how to proceed with them. Should it need more time, it can continue to delay these rules. Thus, the administration can exert some control over the resources it expends on dealing with midnight regulations. In contrast, the administration has to enforce the rules that have already taken effect. If it decides to change a midnight rule to fit its own preferences, it has to move quickly before considerable resources are devoted to enforce the outgoing administration's policy.

Similar to its predecessors, the Obama administration instructed all agencies to delay the effective date for all final rules that had not yet become effective. This directive included the Investment Advice rule, which was published on January 21, 2009. However, it did not cover the Oil Shale Management and Employment Eligibility Verification rules, which were published November 17 and 14, 2008 respectively. Absent external judicial challenges, the Obama administration would have to start enforcing these rules before having a chance to review them.

The two rules timed to take effect prior to Inauguration Day also had poor quality regulatory analysis. Both rules failed to demonstrate the need for regulation or how the rules would help the agencies achieve their stated goals. Specifically, in failing to consider baseline scenarios, i.e., what would happen in the absence of regulation, the RIAs made it difficult to judge whether the rules' objectives could be met without regulation. The Oil Shale Management rule claimed energy independence and lower energy costs as its primary objective, yet it failed to explain how oil shale development would promote this goal, especially given technological uncertainty and prohibitively high extraction costs. Similarly, the Employment Eligibility Verification rule failed to demonstrate the need to mandate E-Verify in light of rapidly growing voluntary enrollment in the program.

In both cases, the RIAs considered only the narrowest range of alternatives. In fact, the alternatives were mere variations of the agencies' preferred course of action. In the case of the Oil Shale Management rule, the agency considered a handful of slightly varying royalty schemes but failed to look at either a baseline scenario or possibility of selling rather than leasing the federal lands. Similarly, the Employment Eligibility Verification rule's only considered alternative limited applicability to new hires only, despite a wider range of alternatives discussed by the Homeland Security Secretary Chertoff in his congressional testimony. Overall, the RIAs seemed to be written in order to satisfy procedural requirements and to justify the pre-selected alternatives.

The Investment Advice rule stands in contrast to the other midnight rules in that it has above average analysis quality. In fact, the rule went beyond the authorizing statute's prescriptions to offer additional alternatives, for which it was later criticized. This suggests that it is the difference in political priorities and not the desire to push through low quality regulation that drove agencies to issue midnight regulations.

Conclusion

As presidential terms near their end, both media and politicians turn their attention to the potential flood of last minute regulations by the outgoing administration. While the regulatory surge during the midnight period is well documented, its motivation remains subject to debate. Some scholars suggest that benign procrastination and agencies' tendency to work to a deadline is behind the midnight surge. In contrast, critics of midnight regulations claim that agencies deliberately wait to issue controversial regulations in order to avoid political fallout or public scrutiny. Alternatively, critics argue that outgoing administrations rush through regulation in order to impose their preferences on their successors.

In this paper, I examine the motivation behind midnight regulations issued at the end of the Bush administration. In contrast to its predecessors, the Bush administration attempted to curb midnight regulations. It instructed agencies to finalize regulations before the midnight period. The administration made exception for rules proposed before June 1, 2008, since the public had ample opportunity to comment on them. Similarly, the administration allowed rules facing statutory or judicial deadlines to move forward. These exceptions constituted the majority of economically significant midnight rules finalized at the end of Bush administration, lending support to the view that midnight surge results from agency procrastination. However, a few rules finalized during the midnight period fell into neither

category. Their share of total was relatively small but non-trivial. As these rules were likely politically motivated, they were selected for in-depth analysis.

The case studies analyzed in this paper suggest a political motivation behind midnight regulation. It is unlikely that agencies waited to finalize these regulations in order to avoid political fallout, as they made their intention to regulate clear far in advance. Their late schedule resulted primarily from external factors beyond the agencies' control. However, the agencies' decision to push forward with these final regulations, contradicting the administration's expressed policy, was politically motivated. The analyzed regulations were likely to be delayed or substantially modified by the incoming administration. By finalizing these rules, the agencies forced them on the incoming administration's agenda.

Regulations' timing emerges as a crucial factor in their ultimate fate. As a first order of business, incoming presidents have made it a practice to delay all rules that have yet to take effect through an executive order. The order essentially covers most economically significant midnight rules, since they can take effect only 60 days after their publication date. It buys incoming administrations time to review the flood of last minute regulations and decide on a course of action. However, rules finalized within two weeks after the Election Day can take effect before the new president assumes office, essentially putting them out of the executive order's reach. The new administration has little time to review and take action on such rules, increasing the likelihood that these rules remain unchanged.

In addition, timing plays a role in the new administration's ability to shape the rules according to its preferences. As political environment changes, the amount of political capital an administration has to expend pursuing its agenda changes as well. Agencies can time controversial rules to ensure they minimize their political costs. Midnight regulations, however, demand an immediate action from the incoming administration, even though the political climate may favor the outgoing administration's position. The incoming administration would have to expend substantial political capital to reverse its predecessor's regulations and may choose to let them stand.

Overall, this paper's findings indicate that different factors may be behind the midnight regulatory surge. For many regulations, agencies' tendency to work to a deadline and desire to avoid delays caused by a political transition may be behind the last minute rush to regulate. In some non-trivial cases, however, last minute regulation may be driven by an outgoing administration's attempt to cast a long shadow and impose its agenda and preferences on its successor.

Appendix I: Mercatus Center Regulatory Analysis Assessment Criteria¹¹⁸

Openness

1. **Accessibility:** How easily were the RIA, the proposed rule, and any supplementary materials found online?
2. **Data Documentation:** How verifiable are the data used in the analysis?
3. **Model Documentation:** How verifiable are the models and assumptions used in the analysis?
4. **Clarity:** Was the Regulatory Impact Analysis comprehensible to an informed layperson?

Analysis

5. **Outcomes:** How well does the analysis identify the desired benefits or other outcomes and demonstrate that the regulation will achieve them?
6. **Systemic Problem:** How well does the analysis identify and demonstrate the existence of a market failure or other systemic problem the regulation is supposed to solve?
7. **Alternatives:** How well does the analysis assess the effectiveness of alternative approaches?
8. **Benefit-Cost Analysis:** How well does the analysis assess costs and benefits?

Use

9. **Use of Analysis:** Does the proposed rule or the RIA present evidence that the agency used the Regulatory Impact Analysis?
10. **Net Benefits:** Did the agency maximize net benefits or explain why it chose another option?
11. **Measures and Goals:** Does the proposed rule establish measures and goals that can be used to track the regulation's results in the future?
12. **Retrospective Data:** Did the agency indicate what data it will use to assess the regulation's performance in the future and establish provisions for doing so?

¹¹⁸ Jerry Ellig and John Morrall, *Assessing the Quality of Regulatory Analysis: A New Evaluation and Data Set for Policy Research*, Working Paper (Mercatus Center, George Mason University, December 2010), <http://mercatus.org/sites/default/files/publication/wp1075-assessing-the-quality-of-regulatory-analysis.pdf>.