Insight

Charting Midnight Regulation Before Dawn: May Rush

SAM BATKINS | JUNE 7, 2016

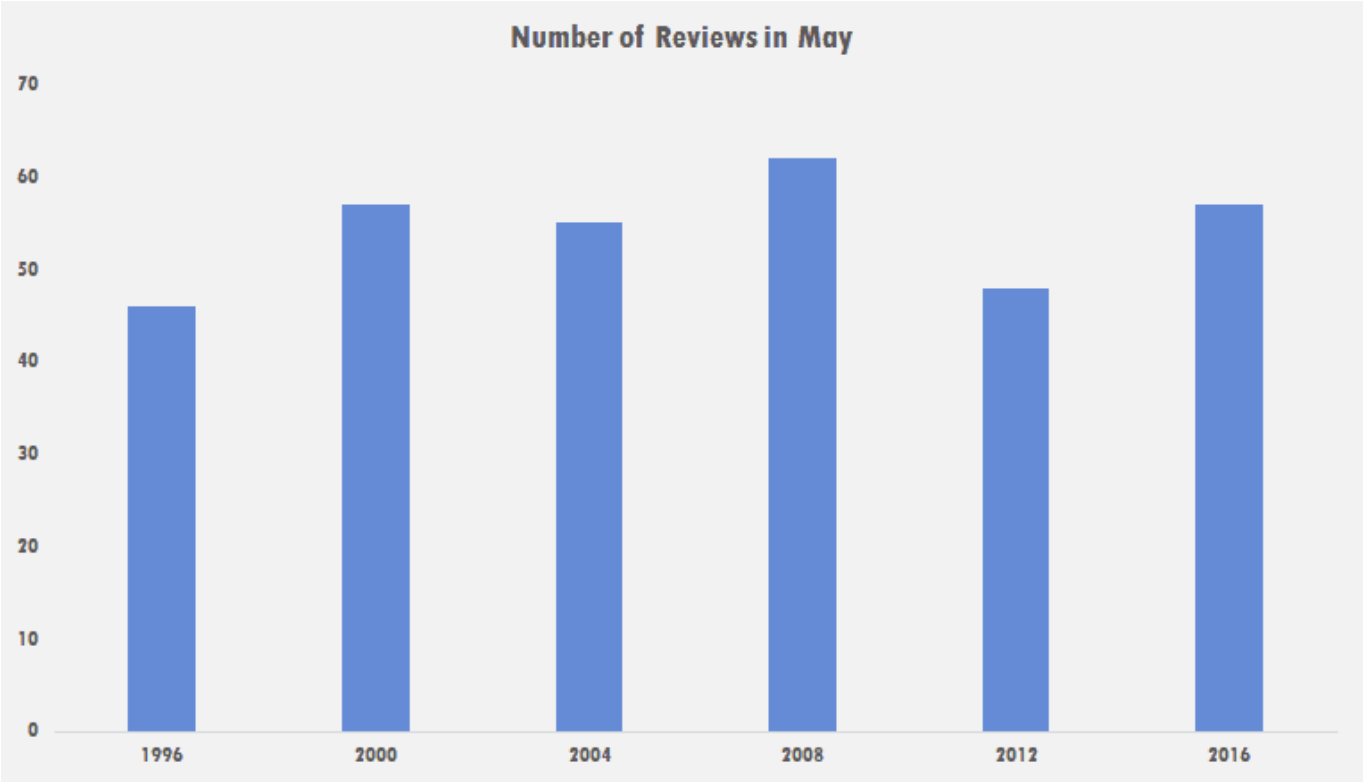
In our series tracking regulation in the final year of the Obama Administration, this month once again proved the administration is on a record pace to issue significant regulation. Although the overall number of regulations is hardly notable, the administration is approving a historic number of economically significant rulemakings (impact of $100 million or more). In March, the White House approved 10 economically significant rulemakings, down from 15 in February. In April, that figure rose to 16 and May was little different, with 14 new significant measures, more than any comparable period in the past 20 years. Through the first five months of this year, regulators have approved 58 significant rulemakings; the next two closest years were 2008 and 2012, when regulators approved just 42 and 39 significant rulemakings, respectively. In other words, the White House has approved 38 percent more economically significant regulatory action than any comparable period since 1996.

With less than a year for President Obama to regulate, this is his midnight year for regulation. Although it's not the official midnight period yet (defined as the period after Election Day, but before the next president takes office), each month the American Action Forum (AAF) will highlight the final regulatory activity of the administration and compare it to similar times in the past. This monthly series will highlight all of the rules leaving the White House scheduled for official publication, all economically significant measures, the length of time for White House review, the number of rules rejected or withdrawn from the rulemaking process, and the monthly cost of federal regulatory activity.

May 2016

Once again, the aggregate regulatory output last month wasn't off the charts. The Office of Information and Regulatory Affairs (OIRA), the branch of the White House in charge of

reviewing cabinet-agency regulation, concluded review of 57 rules, up from 43 rules in April. In May 2008, by contrast, OIRA reviewed 62 rulemakings. The low point for May activity took place in 1996 when OIRA reviewed just 46 rules. The chart below tracks overall regulatory activity during these midnight years.



However, for economically significant measures, May of 2016 blew away the field. OIRA concluded review of 14 significant measures, 27 percent more than 2012, 50 percent more than 2008, and 114 percent more than 2004. Below are just some of the notable regulations released last month:

1. Final "E-Cigarettes" Rule;
2. Final Revised Fracking Standards;
3. Nondiscrimination Rules under the ACA;
4. Final Overtime Standards; and
5. A Pair of Final Food Labeling Revisions.

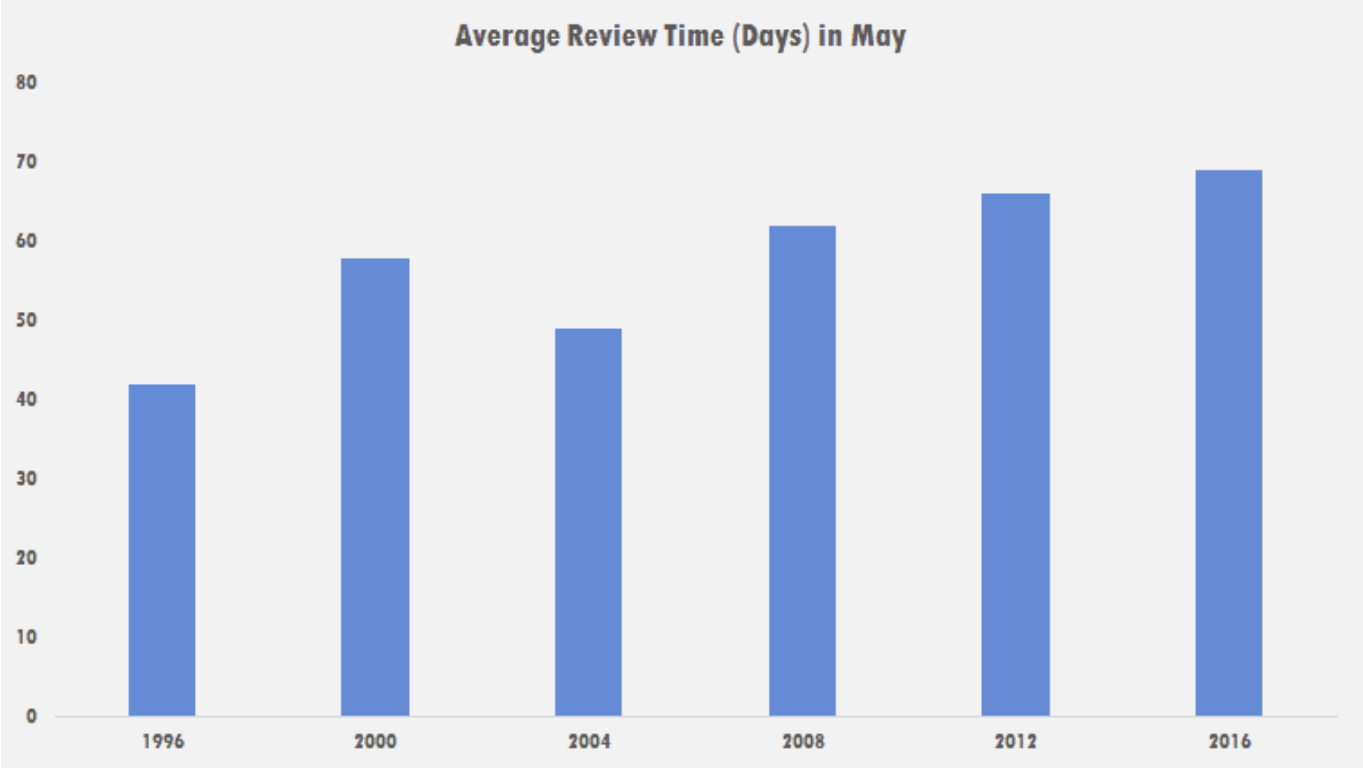
Somehow, the administration also managed to approve two significant Department of Energy standards and a proposed Renewable Fuels Standard. Despite the output of 14 significant measures, there are still 32 economically significant measures pending review

(as of this writing), down from 34 measures last month, so agencies continue to pile up notable rulemakings at the White House. In May, OIRA received 12 additional measures, down from the 16 new significant rules it received in April.

Once again, OIRA concluded review of several rules that had been under scrutiny for more than 120 days, which is the generally allowed timeframe for White House review under current executive orders. OIRA discharged eight rulemakings that had been under review for more than 120 days, including "Efficiency Standards for Manufactured Housing," which had been at OIRA for 230 days.

In a continuing trend, May eclipsed other similar periods during presidential election years for average review times. The average review time this May was 69 days, compared to 66 in May of 2012. The next closest figure was 62 days during May 2008.

For comparison, the chart below tracks the average review time since 1996 during midnight years.



With regard to "withdrawn" rulemakings, or measures that agencies and OIRA pull back from review, there were two in May. In contrast, there were five withdrawn measures in 2014, three in 2000, and two in 1996. There is an obvious disincentive for agencies to withdraw rules this late during an administration and the White House has not aggressively pulled back regulations from review, at least compared to other similar periods.

The Cost

Thanks to AAF's Reg Rodeo tool, the public can track regulatory costs and paperwork burdens over time, including data on major rules, Dodd-Frank, and the Affordable Care Act. In May 2016, regulators finalized $22 billion in costs, down from $33 billion in April, but up from $9.6 billion in March and $17.8 billion in costs from January. This significant total was due mostly to final publication of the administration's controversial "Overtime" rule. How does this compare to other similar periods? Although not a presidential election year, in May 2015, regulators published $2.8 billion in costs. In terms of paperwork, regulators published 31.4 million final hours this May, compared to May 2015, with 1.2 million hours.

Finally, there is the ultimate question of President Obama's regulatory legacy. Through this point in his presidency (May of 2008), President George W. Bush had issued 417 major rules. By contrast, President Obama has issued 588, or 41 percent more than his predecessor. AAF will continue to publish monthly updates of similar periods in history.