Insight

Charting Midnight Regulation Before Dawn: Part 1

SAM BATKINS | FEBRUARY 8, 2016

"Midnight" regulation refers to the historical rush of federal rules after Election Day and before the next president takes the oath of office. As a president leaves, if they are replaced by a president of a different political party, there will be an incentive to cement as many regulatory priorities as possible. The charts below track "economically significant" and all rulemakings issued during the midnight period between 1997 and 2012. As the data demonstrate, the last two political transitions in the White House (2000 and 2008) resulted in abnormally high regulatory activity.

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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, 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all economically significant measures, the length of time for White House review, the number of rules rejected or withdrawn from the rulemaking process, and the monthly cost of federal regulatory activity.

JANUARY 2016

Compared to other midnight periods dating back to 1996, last month was relatively tame. The Office of Information and Regulatory Affairs (OIRA), the branch of the White House in charge of reviewing cabinet-agency regulation, concluded review of 41 rules in January. In January 2012, by contrast, OIRA reviewed 60 rulemakings. The low point for January activity took place in 1996, when OIRA reviewed just 28 rules. The chart below tracks overall regulatory activity during these midnight years.

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For economically significant measures, January 2016 also does not stand out amongst other years. OIRA discharged just four significant rules:

1. Covered Outpatient Drugs,
2. Flaring and Venting for Natural Gas,
3. Face-to-Face Health Care Requirements, and
4. Medicare Accountable Care Organizations.

This volume, although not trivial, is dwarfed by 2012 (seven significant measures), 2008 (also seven), and 2004 (eight significant regulations). There are likely a few reasons for the output this year. One partial explanation: the federal government was closed for two-and-a-half days due to winter storm Jonas. Regulations were still officially published, but regulatory output declined slightly shortly after the storm. There are still 32 economically significant measures, including six from the Department of Energy, that OIRA could move out at any time.

There is one area where 2016 easily tops other midnight years: the length of review for concluded rulemakings. On average, the review time for a rulemaking that OIRA concluded was 86 days, with a high of 335 days (for criminal background checks) and three rules that technically spent zero days under White House review. This 86-day waiting period for rulemakings easily outpaces other years; 2012 was third with 76 days and 1996 was last with an average time of just 42 days.

There could be several explanations behind 2016's lead, but one is the administration begging to clear some of the lingering regulatory priorities that were never finalized. The longer average review time doesn't indicate rules are flying through OIRA, but it might suggest priorities like background checks, workplace nondiscrimination, and greenhouse gas controls will be final soon. Technically, rulemakings shouldn't spend longer than 120 days at OIRA, but 14 measures concluded in January spent longer than 120 days, including two significant rules. Again, there are various explanations for these figures and more data in 2016 might help to answer these questions.

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

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Another trend worth exploring is the number of "withdrawn" rules during election years. In theory, this figure should be relatively small, as the administration has just a few months left in power and any withdrawn proposed rule likely will take longer than a year to complete. Withdrawn measures are rare, and indeed, there was just one last month. However, there were seven in January 2012 and four in January 2004.

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 January 2016, regulators imposed $17.8 billion in final rule costs. How does this compare to other similar periods? Although not a presidential election year, in January 2015, regulators published $14.2 billion in costs. In 2012, that figure was $7.7 billion and in 2008, the last time there was a party shift in the White House, regulators imposed $8.9 billion in regulatory burdens. For costs at least, President Obama has gotten off to a fast start in his last year in office.

Finally, there is the ultimate question of President Obama's regulatory legacy. Various reports have described his agenda as "job-killing," while others claim he regulates less than his predecessor. Thankfully, the Government Accountability Office keeps track of all major regulations. Through this point in his presidency, George W. Bush issued 397 major rules. By contrast, President Obama has issued 558, or 40 percent more. AAF will continue to publish monthly updates comparing President Obama's last days of regulation to other similar periods in history.