

Congress of the United States
Washington, DC 20515

November 16, 2020

The Honorable Russell T. Vought
Acting Director
Office of Management and Budget
725 17th Street, N.W.
Washington, D.C. 20503

The Honorable Paul J. Ray
Administrator
Office of Information and Regulatory Affairs
725 17th Street, N.W.
Washington, D.C. 20503

Dear Acting Director Vought and Administrator Ray:

The American people recently elected President-Elect Joseph R. Biden and Vice President-Elect Kamala Harris. As a result, the leadership of the Office of Management and Budget (OMB), the Office of Information and Regulatory Affairs (OIRA), and other Federal agencies will soon change. We have strong concerns that there may be last-minute roll-backs of health, safety, and environmental protections by the outgoing Trump Administration. We are concerned that these “midnight rules” may be rushed through without providing Congress adequate time to review these rules, as required by law. These rules could include significant actions that have the potential to weaken air quality standards, lift protections for endangered species, jeopardize national security, or impose new immigration rules.¹

The Government Accountability Office (GAO) has found that agencies publish more final regulations at the end of presidential administrations.² The Congressional Research Service has explained that during presidential transitions when control of the executive branch shifts, agencies may have an increased incentive to engage in “midnight rulemaking” in order to implement policies before the end of the president’s term.³ Because the departing Administration may rush the adoption of midnight rules during a transition, the quality, public input, and review of these rules may suffer.

In 2018, GAO found that during the transition periods in 2000, 2008, and 2016, 25% of economically significant rules did not comply with the procedural requirements of the Congressional Review Act (CRA).⁴ GAO found that the failure of agencies to comply with the CRA “has the overall effect of making it more difficult for Congress to exercise its oversight role under CRA,” and “can potentially create legal uncertainty for agencies and regulated parties.”⁵

¹ See, e.g., *White House Races to Complete Regulations Before Trump Exits*, Science (Nov. 10, 2020) (online at <https://www.sciencemag.org/news/2020/11/white-house-races-complete-regulations-trump-exits>).

² Gov’t Accountability Off., GAO-18-18, *Federal Rulemaking: OMB Should Work with Agencies to Improve Congressional Review Act Compliance during and at the End of Presidents’ Terms* 7 (2018) (online at <https://www.gao.gov/assets/700/690624.pdf>).

³ See Cong. Research Serv., R42612, *Midnight Rulemaking: Background and Options for Congress* 1 (2016), (online at <https://crsreports.congress.gov/product/pdf/R/R42612>).

⁴ See Gov’t Accountability Off., GAO-18-183, *Federal Rulemaking: OMB Should Work with Agencies to Improve Congressional Review Act Compliance during and at the End of Presidents’ Terms*, 20-27 (2018) (online at <https://www.gao.gov/assets/700/690624.pdf>).

⁵ *Id.* at 26.

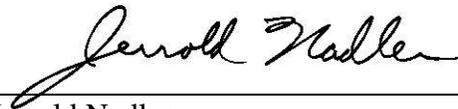
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At the end of the Obama Administration, OIRA Administrator Howard Shelanski sent a memo to executive branch agencies that cautioned the agencies “to avoid an end-of-year scramble that has the potential to lower the quality of regulations” and “to tax the resources available for interagency review.”⁶

We request that you immediately instruct agencies to avoid promulgating midnight rules. We also request that you ensure that before any rule is finalized between now and January 20, 2021, it meets all legal requirements, including a notice and comment process. This is essential to ensure that agencies fully comply with their statutory obligations during the transition period—including those under the Administrative Procedure Act and the CRA—while also focusing their efforts to respond to the ongoing national public health emergency and economic recovery.

Thank you for your attention to this matter.

Sincerely,



Jerrold Nadler
Chairman
Committee on the Judiciary



Carolyn B. Maloney
Chairwoman
Committee on Oversight and Reform

⁶ See Memorandum from Howard Shelanski, Administrator, Office of Information and Regulatory Affairs, to Deputy Secretaries 1-2 (Dec. 17, 2015), (online at https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/agencyinformation_circulars_memoranda_2015_pdf/regulatory_review_at_the_end_of_the_administration.pdf).