

# CRS Report for Congress

## Midnight Rulemaking: Considerations for Congress and a New Administration

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# Midnight Rulemaking: Considerations for Congress and a New Administration

## Summary

At the end of every recent presidential administration involving a change in the party controlling the White House, the level of rulemaking activity by federal agencies tends to increase. On May 9, 2008, White House Chief of Staff Joshua B. Bolten issued a memorandum to the heads of executive departments and agencies stating that “regulations to be finalized in this Administration should be proposed no later than June 1, 2008, and final regulations should be issued no later than November 1, 2008.” Despite this directive, federal agencies appear to be issuing an increasing number of “midnight rules” at the end of the Bush Administration, including a number of rules attracting controversy.

One approach that previous Presidents have used to control rulemaking at the start of their administrations has been the imposition of a moratorium on new regulations by executive departments and independent agencies, accompanied by a requirement that the departments and agencies postpone the effective dates of certain rules. However, for rules that have already been published in the *Federal Register*, the only way for the departments or agencies to eliminate or change the rules is by going back through the rulemaking process. Although the Administrative Procedure Act (5 U.S.C. § 551 *et seq.*) permits agencies to shorten the rulemaking process for “good cause,” an agency’s use of this exception is subject to judicial review.

The Congressional Review Act (CRA, 5 U.S.C. §§ 801-808) permits the use of expedited procedures, primarily in the Senate, to disapprove agencies’ final rules. The CRA requires that agencies submit all final rules to Congress before they take effect. If Congress adjourns its annual session *sine die* less than 60 “legislative days” in the House of Representatives or 60 “session days” in the Senate after a rule is submitted to it, then the rule is carried over to the next session of Congress and subject to possible disapproval during that session.

Although only one rule has been disapproved using CRA procedures since the legislation was enacted in 1996, Congress has frequently added provisions to agency appropriations bills to prohibit the finalization of particular proposed rules, prohibit the development of particular regulations, restrict the implementation or enforcement of certain rules, and put conditions on the development or implementation of particular rules. Unlike CRA disapprovals, however, these provisions do not eliminate the regulations from the *Code of Federal Regulations*, and do not prevent the agency from issuing the same or similar regulation.

This report will be updated when additional information becomes available.

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# Midnight Rulemaking: Considerations for Congress and a New Administration

As various authors have documented, at the end of every recent presidential administration involving a change in the party controlling the White House, the level of rulemaking activity by federal agencies tends to increase — a phenomenon often referred to as “midnight rulemaking.”<sup>1</sup> For example, Jay Cochran of the Mercatus Center at George Mason University reported that, between 1948 and 2001, when the party in control of the White House changed, the number of pages printed in the *Federal Register* increased an average of 17% during the final three months of an outgoing administration when compared to the number of pages during the same period in non-election years.<sup>2</sup> Susan Dudley, the current administrator of the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB), wrote in 2001 (while a senior research fellow at the Mercatus Center) that the sharp increase in regulatory output at the end of the Clinton Administration was “not an anomaly,” and that “sudden bursts of regulatory activity at the end of a presidential administration are systematic, significant, and cut across party lines.”<sup>3</sup>

One explanation for the issuance of “midnight rules” is the desire of the outgoing administration to complete its work and achieve certain policy goals before the end of its term of office — what Cochran termed the “Cinderella effect.” However, issuing midnight rules can also help ensure a legacy for a President. As another observer said, putting agency rules into effect before the end of a presidency is “a way for an administration to have life after death.”<sup>4</sup>

## Midnight Rules at the End of the Bush Administration

Recognizing the tendency for midnight rulemaking at the end of a presidency, on May 9, 2008, White House Chief of Staff Joshua B. Bolten issued a memorandum

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<sup>1</sup> See Jerry Brito and Veronique de Rugy, “Midnight Regulations and Regulatory Review,” Working Paper No. 08-34, Mercatus Center, George Mason University, available at [<http://www.mercatus.org/uploadedFiles/Mercatus/Publications/Midnight%20Regulation%20s.pdf>] for a recent example of this research.

<sup>2</sup> Jay Cochran, III, *The Cinderella Constraint: Why Regulations Increase Significantly During Post-Election Quarters* (Arlington, VA: Mercatus Center, 2001), available at [<http://www.mercatus.org/PublicationDetails.aspx?id=17546>].

<sup>3</sup> Susan E. Dudley, “Reversing Midnight Regulations,” *Regulation*, Spring 2001, p. 9.

<sup>4</sup> John M. Broder, “A Legacy Bush Can Control,” *New York Times*, September 9, 2007, p. A1, quoting Phillip Clapp, president of the National Environmental Trust.

to the heads of executive departments and agencies stating that, except for “extraordinary circumstances, regulations to be finalized in this Administration should be proposed no later than June 1, 2008, and final regulations should be issued no later than November 1, 2008.”<sup>5</sup> He also said the administrator of OIRA would “coordinate an effort to complete Administration priorities in this final year,” and that the OIRA administrator would “report on a regular basis regarding agency compliance with this memorandum.”<sup>6</sup>

## Final Rules Submitted

Despite this initiative, federal agencies appear to be issuing an increasing number of rules at the end of the Bush Administration. One indication is the number of final rules that are being sent to the Government Accountability Office (GAO) pursuant to requirements in the Congressional Review Act (CRA, 5 U.S.C. §§ 801-808).<sup>7</sup> According to data obtained from GAO, from January through May 2008, GAO received an average of 232 rules per month from federal agencies. However, from June through October 2008, GAO received an average of 310 rules per month — a 33.6% increase. The rate of rule submissions from June through October 2008 is also higher when compared to the same June-through-October period in 2007 (241 rules per month in 2007 compared with 310 rules per month in 2008 — a 28.6% increase).

The CRA also requires GAO to provide Congress with a report on each “major” rule (e.g., rules with at least a \$100 million impact on the economy) within 15 calendar days of the rule being sent to GAO and Congress.<sup>8</sup> During the first five months of 2008, federal agencies sent a total of 21 major rules to GAO. However, in the second five months of 2008 (June through October), the agencies sent GAO 46 major rules (including 18 in the month of October alone) — a 119% increase. The number of major rules in the second five months of 2008 is also higher than the number in the second five months of 2007 (46 major rules during this period in 2008 compared with 28 major rules in 2007 — a 64% increase).

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<sup>5</sup> See [[http://www.whitehouse.gov/omb/infoereg/cos\\_memo\\_5\\_9\\_08.pdf](http://www.whitehouse.gov/omb/infoereg/cos_memo_5_9_08.pdf)] for a copy of this memorandum. The memorandum said that agencies needed to “resist the historical tendency of administrations to increase regulatory activity in their final months.”

<sup>6</sup> Under Executive Order 12866, OIRA reviews all significant rules before they are published in the *Federal Register*, and is the President’s chief representative in the rulemaking process. See CRS Report RL32397, *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs*, by Curtis W. Copeland.

<sup>7</sup> The Congressional Review Act (in 5 U.S.C. § 801(a)(1)(A)) requires all final rules to be sent to each house of Congress and GAO before they can take effect. This requirement applies to all federal agencies, including independent boards and commissions such as the Securities and Exchange Commission and the Federal Communications Commission.

<sup>8</sup> 5 U.S.C. § 801(a)(2)(A).

## Rules Under OIRA Review

Another indication of increased rulemaking activity in the final months of the Bush Administration is the number of rules being reviewed by OIRA before being published in the *Federal Register*. Although the OIRA data do not include rules issued by independent boards and commissions (e.g., the Securities and Exchange Commission, or the Federal Communications Commission), the data do include all cabinet departments and independent agencies like the Environmental Protection Agency (EPA) and the Social Security Administration. Also, the data include only rules considered “significant” under Executive Order 12866 — rules that are the most likely to be controversial.<sup>9</sup>

In September and October 2008, OIRA reviewed a total of 149 significant rules, including 103 final rules. The monthly average number of rules reviewed in September and October (75) was nearly 50% higher than the average for the preceding eight months of 2008 (51). More tellingly, the monthly average number of *final* rules that OIRA reviewed in September and October (52) was more than three times the average of the previous eight months (16). Also, the number of rules that OIRA reviewed in September and October 2008 was nearly 70% higher than the same two months in 2007 (149 versus 88), and the number of final rules was nearly 150% higher (103 versus 42).

There is also evidence that the pace of OIRA’s work is continuing. As of October 31, 2008, there were 136 rules under review at OIRA, including 84 final rules. The agencies with the most rules under review at OIRA at that time were

- EPA (21 rules, including 7 final rules);
- the Department of Health and Human Services (HHS, 18 rules, including 13 final rules);
- the Department of Justice (DOJ, 11 rules, including 8 final rules);
- the Department of Veterans Affairs (DVA, 11 rules, including 8 final rules);
- the Department of Transportation (DOT, 11 rules, including 7 final rules); and

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<sup>9</sup> Section 3(f) of Executive Order 12866 defines a rule as “significant” if it would “(1) 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 governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.”

- the Department of Homeland Security (DHS, 10 rules, including 8 final rules).

At least 14 of the 136 rules that were under review at OIRA were “economically significant” rules (e.g., rules that are expected to have a \$100 million impact on the economy) that would probably not be allowed to take effect for 60 days after they were published in the *Federal Register*.<sup>10</sup>

## Rules Attracting Controversy

Several Members of Congress and others have expressed concerns about many proposed and final rules that have been published or that are still under review, and some have called for the next President or Congress to stop certain rules from taking effect.<sup>11</sup> Rules that have been identified as problematic include the following:

- an EPA “new source review” rule that, if made final, would alter current requirements stipulating when upgrades at older power plants would require the installation of modern anti-pollution equipment.<sup>12</sup> EPA said that the change would balance environmental protection with the “economic need of sources to use existing physical and operating capacity.” However, environmental groups contend that the change would weaken existing protections and conflicts with a recent decision of the Supreme Court related to this issue.<sup>13</sup>

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<sup>10</sup> As discussed later in this report, Section 801(a)(3) of the Congressional Review Act generally requires the effective dates of all “major” rules to be delayed for at least 60 days after publication in the *Federal Register* or presentation to Congress, whichever is later. The definitions of an “economically significant” rule and a “major” rule are essentially the same.

<sup>11</sup> For example, the chairman of the House Select Committee on Energy Independence and Global Warming released a report on October 31, 2008, listing a number of rules that the majority staff considered problematic. To view a copy of this report, see [[http://globalwarming.house.gov/mediacenter/pressreleases\\_2008?id=0056](http://globalwarming.house.gov/mediacenter/pressreleases_2008?id=0056)]. The same day, the Speaker of the House issued a list of “ghoulish midnight regulations” being issued by the Bush Administration. To view a copy of this list, see [<http://www.speaker.gov/blog/?p=1567>]. On November 3, 2008, OMB Watch published a list of “controversial rules worth watching.” To view this list, see [<http://www.ombwatch.org/article/blogs/entry/5494>]. For a recent article on this issue, see Cindy Skrzycki, “Democrats Eye Bush Midnight Regulations,” *Washington Post*, November 11, 2008, p. D3.

<sup>12</sup> For the proposed rule, see U.S. Environmental Protection Agency, “Supplemental Notice of Proposed Rulemaking for Prevention of Significant Deterioration and Nonattainment New Source Review: Emission Increases for Electric Generating Units,” 72 *Federal Register* 26201, May 8, 2007.

<sup>13</sup> American Lung Association, EarthJustice, Environmental Defense, Natural Resources Defense Council, and Sierra Club; “Comments on EPA’s Proposed ‘Supplemental Notice of Proposed Rulemaking for Prevention of Significant Deterioration and Nonattainment New Source Review: Emission Increases for Electric Generating Units,’” available at [<http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=09>]

- a Department of the Interior (DOI) rule that, in the words of the proposal, requires that surface coal mining operations “minimize the creation of excess spoil and the adverse environmental impacts of fills,” but that some observers have said would allow deposits of waste mountaintop material within 100 feet of certain streams.<sup>14</sup>
- a DOI proposed rule that would, among other things, give federal agencies greater responsibility in determining when and how their actions may affect species under the Endangered Species Act.<sup>15</sup> Several Members of Congress have expressed concerns about the draft rule, and congressional hearings are expected.<sup>16</sup>
- a DOJ proposed rule that would “clarify and update” the policies governing criminal intelligence systems that receive federal funding, but that some contend would make it easier for state and local police to collect, share, and retain sensitive information about Americans, even when no underlying crime is suspected.<sup>17</sup>
- a DOJ proposed rule that would “adopt enforceable accessibility standards under the Americans with Disabilities Act of 1990 (ADA),” but that critics contend would weaken those standards and reduce enforcement efforts.<sup>18</sup>

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<sup>13</sup> (...continued)  
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<sup>14</sup> For the proposed rule, see U.S. Department of the Interior, Office of Surface Mining Reclamation and Enforcement, “Excess Spoil, Coal Mine Waste, and Buffers for Waters of the United States,” *72 Federal Register* 48889, August 24, 2007. The final rule has been under review at OIRA since September 22, 2008. For characterizations of the rule, see John M. Broder, “Rule to Expand Mountaintop Coal Mining,” *New York Times*, August 23, 2007, p. A1.

<sup>15</sup> For the proposed rule, see U.S. Department of the Interior, Fish and Wildlife Service, and U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, “Interagency Cooperation Under the Endangered Species Act,” *73 Federal Register* 47868, August 15, 2008. On September 12, 2008, the agencies extended the comment period for this rule to October 14, 2008, and on October 27, 2008, the agencies allowed comment on the draft environmental assessment until November 6, 2008. See also Juliet Eilperin, “Endangered Species Act Changes Give Agencies More Say,” *Washington Post*, August 12, 2008, p. A1, for characterizations of the rule.

<sup>16</sup> For more detailed information about this rule, see CRS Report RL34641, *Proposed Changes to Regulations Governing Consultation Under the Endangered Species Act (ESA)*, by Kristina Alexander and M. Lynne Corn.

<sup>17</sup> For the proposed rule, see U.S. Department of Justice, Office of Justice Programs, “Criminal Intelligence Systems Operating Procedures,” *73 Federal Register* 44673, July 31, 2008. For a characterization of the rule, see Spencer S. Hsu and Carrie Johnson, “U.S. May Ease Police Spy Rules,” *Washington Post*, August 16, 2008, p. A1.

<sup>18</sup> For the proposed rule, see U.S. Department of Justice, Civil Rights Division, “Nondiscrimination on the Basis of Disability by Public Accommodations and in  
(continued...)



- an EPA revision of the definition of “solid waste” that would exclude certain types of sludge and byproducts (referred to in the proposed rule as “hazardous secondary waste”) from regulation under the Resource Conservation and Recovery Act.<sup>19</sup>
- an EPA rule that is expected to change how pollution levels are measured under certain parts of the Clean Air Act, and that some contend will change emissions standards for industrial facilities operating near national parks.<sup>20</sup>
- a National Park Service rule that, if consistent with the April 2008 proposal, would change the agency’s current policy and permit state laws to determine whether concealed firearms could be carried in national parks.<sup>21</sup>
- a proposed amendment to the Federal Acquisition Regulation to require certain contractors and subcontractors to use the E-Verify system to confirm that certain of their employees are eligible to work in the United States, but which the U.S. Chamber of Commerce and others said contravenes the intent of Congress and raises numerous practical difficulties.<sup>22</sup>

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<sup>18</sup> (...continued)

Commercial Facilities,” *73 Federal Register* 34508, June 17, 2008. For a characterization of the rule, see “Ghoulis Midnight Regulations,” available at [<http://www.speaker.gov/blog/?p=1567>].

<sup>19</sup> The final rule was published on October 30, 2008. See U.S. Environmental Protection Agency, “Revisions to the Definition of Solid Waste,” *73 Federal Register* 64668, October 30, 2008. For more information on this rule and the perspectives of various parties, see Charlotte E. Tucker, “EPA Completing Last Steps for Regulation to Redefine Waste to Encourage Recycling,” *BNA Daily Report for Executives*, July 17, 2008, p. C-1.

<sup>20</sup> Juliet Eilperin, “Clean-Air Rules Protecting Parks Set to Be Eased,” *Washington Post*, May 16, 2008, p. A1; and Mark Clayton, “Why National Parks, Coal-Fired Power Plants May Be Neighbors,” *Christian Science Monitor*, April 24, 2008, p. 13. For the proposed rule, see U.S. Environmental Protection Agency, “Prevention of Significant Deterioration New Source Review: Refinement of Increment Modeling Procedures,” *72 Federal Register* 31371, June 6, 2007. The final rule has been under review at OIRA since October 30, 2008. In an April 2008 letter responding to questions posed by the chairman of the House Committee on Oversight and Government Reform, EPA said it was “unable to conclusively confirm or deny” suggestions from the National Park Service that the proposed rule would make it easier to build power plants near national parks. See [<http://oversight.house.gov/documents/20080514180808.pdf>].

<sup>21</sup> U.S. Department of the Interior, National Park Service, “General Regulations for Areas Administered by the National Park Service and the Fish and Wildlife Service,” *73 Federal Register* 2338, April 30, 2008. The final rule has been under review at OIRA since November 4, 2008.

<sup>22</sup> For the proposed rule, see U.S. Department of Defense, General Services Administration, and National Aeronautics and Space Administration, “Federal Acquisition Regulation; FAR (continued...)”

- a Department of Labor proposed rule that would change the way that occupational health risk assessments are conducted within the department. Legislation has been introduced in the 110<sup>th</sup> Congress (H.R. 6660 and S. 3566) that would prohibit the issuance or enforcement of this rule.<sup>23</sup>

As discussed in detail in the remainder of this report, various options are available to both a new President and Congress to delay or prevent the implementation of regulations viewed as problematic, or to eliminate them entirely.

## Options for a New Administration

One approach that previous Presidents have used to control rulemaking at the start of their administrations has been the imposition of a moratorium on new regulations by executive departments and independent agencies, accompanied by a requirement that the departments and agencies postpone the effective dates of certain rules.<sup>24</sup> However, for rules that have already been published in the *Federal Register*, the only way for the departments or agencies to eliminate or change the rules is by going back through the rulemaking process.

### Regulatory Moratoriums and Postponements

On January 29, 1981, shortly after taking office, President Reagan issued a memorandum to the heads of the Cabinet departments and the EPA Administrator

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<sup>22</sup> (...continued)

Case 2007-013, Employment Eligibility Verification,” 73 *Federal Register* 33374, June 12, 2008. See [[http://www.uschamber.com/assets/labor/080811\\_fed\\_Ks.pdf](http://www.uschamber.com/assets/labor/080811_fed_Ks.pdf)] for the views of the U.S. Chamber of Commerce. The day after this proposed rule was published, the Department of Homeland Security announced it was requiring its contractors to use the E-verify program. U.S. Department of Homeland Security, Office of the Secretary, “Designation of the Electronic Employment Eligibility Verification System Under Executive Order 12989, as Amended by the Executive Order Entitled ‘Amending Executive Order 12989, as Amended’ of June 6, 2008,” 73 *Federal Register* 33837, June 13, 2008. OIRA received the final rule on October 14, 2008, and completed its review on October 31, 2008. As of November 12, 2008, the final rule had not been published in the *Federal Register*.

<sup>23</sup> For the proposed rule, see U.S. Department of Labor, Office of the Secretary, “Requirements for DOL Agencies’ Assessment of Occupational Health Risks,” 73 *Federal Register* 50909, August 29, 2008. For characterizations of the rule, see Carol D. Leonnig, “U.S. Rushes to Change Workplace Toxin Rules,” *Washington Post*, July 23, 2008, p. A1; and Gayle Cinquegrani, “Miller Introduces House Bill to Prohibit DOL ‘Secret Rule’ on Workplace Toxin Exposure,” *BNA Daily Report for Executives*, August 1, 2008, p. A-7. On August 18, 2008, a *Washington Post* editorial recommended that the Department of Labor withdraw its proposed rule (“A Toxic Proposal: The Labor Department Politicizes a Regulation of Workplace Health,” *Washington Post*, August 18, 2008, p. A10).

<sup>24</sup> All of these presidential moratoriums on rulemaking have generally exempted regulations issued by independent regulatory boards and commissions, as well as regulations issued in response to emergency situations or statutory or judicial deadlines.

directing them to take certain actions that would give the new administration time to implement a “new regulatory oversight process,” particularly for “last-minute decisions” made by the previous administration.<sup>25</sup> Specifically, the memorandum said that agencies should, to the extent permitted by law, (1) postpone for 60 days the effective date of all final rules that were scheduled to take effect during the next 60 days, and (2) refrain from promulgating any new final rules. Executive Order 12291, issued a few weeks later, contained another moratorium on rulemaking that supplemented, but did not supplant, the January 29, 1981, memorandum.<sup>26</sup> Section 7 of the executive order directed agencies to “suspend or postpone the effective dates of all major rules that they have promulgated in final form as of the date of this Order, but that have not yet become effective.” Excluded were major rules that could not be legally postponed or suspended, and those that ought to become effective “for good cause.” Agencies were also directed to refrain from promulgating any new final rules until a final regulatory impact analysis had been conducted.

On January 22, 1993, Leon E. Panetta, the Director of OMB for the incoming Clinton Administration, sent a memorandum to the heads and acting heads of Cabinet departments and independent agencies requesting them to (1) not send proposed or final rules to the Office of the Federal Register for publication until they had been approved by an agency head appointed by President Clinton and confirmed by the Senate, and (2) withdraw from the Office of the Federal Register all regulations that had not been published in the *Federal Register* and that could be withdrawn under existing procedures.<sup>27</sup> The requirements did not apply, however, to any rules that had to be issued immediately because of a statutory or judicial deadline. The OMB Director said these actions were needed because it was “important that President Clinton’s appointees have an opportunity to review and approve new regulations.”

Most recently, on January 20, 2001, Andrew H. Card, Jr., assistant to President George W. Bush and chief of staff, sent a memorandum to the heads and acting heads of all executive departments and agencies generally directing them to (1) not send proposed or final rules to the Office of the Federal Register, (2) withdraw from the Office rules that had not yet been published in the *Federal Register*, and (3) postpone for 60 days the effective date of rules that had been published but had not yet taken effect.<sup>28</sup> The Card memorandum instructed agencies to exclude any rules promulgated pursuant to statutory or judicial deadlines, and to notify the OMB Director of any rules that should be excluded because they “impact critical health and safety functions of the agency.” The memorandum indicated that these actions were

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<sup>25</sup> See [<http://www.presidency.ucsb.edu/ws/index.php?pid=44134>] for a copy of this memorandum.

<sup>26</sup> Executive Order 12291, “Federal Regulation,” 46 *Federal Register* 13193, February 17, 1981.

<sup>27</sup> See [<http://www.prop1.org/rainbow/adminrec/930122lp.htm>] for a copy of this memorandum.

<sup>28</sup> U.S. White House Office, “Regulatory Review Plan,” *Federal Register*, vol. 66, no. 16, January 24, 2001, p. 7702. To view a copy of this memorandum, see [[http://www.whitehouse.gov/omb/inforeg/regreview\\_plan.pdf](http://www.whitehouse.gov/omb/inforeg/regreview_plan.pdf)].

needed to “ensure that the President’s appointees have the opportunity to review any new or pending regulations.”

**Effects of the Card Memorandum.** In February 2002, GAO reported on the delay of effective dates of final rules subject to the Card memorandum.<sup>29</sup> GAO indicated that 371 final rules were subject to this aspect of the Card memorandum, and federal agencies delayed the effective dates of at least 90 of them. As of the one-year anniversary of the Card memorandum, most of the 90 rules had taken effect, but one had been withdrawn and not replaced by a new rule, three had been withdrawn and replaced by new rules, and nine others had been altered (e.g., different implementation date or reporting requirement). While some agencies allowed the public to comment on the extensions of the effective dates, most agencies simply published final rules citing the Administrative Procedure Act’s “good cause” or “procedural rule” exceptions to notice and comment rulemaking.<sup>30</sup> One author noted that such practices “tended to evade judicial challenge due to their short time frames, but they did occasion criticism.”<sup>31</sup>

**The Bolten Memorandum.** Viewed in this context, the May 2008 memorandum by White House Chief of Staff Bolten represents both a continuation of a trend of presidential involvement in rulemaking and an evolution in that involvement. Because the Congressional Review Act prohibits “major” rules from taking effect for 60 days after they are promulgated, one effect of the Bolten memorandum’s requirement that final rules be published in the *Federal Register* by November 1, 2008, would be to ensure that these rules will have taken effect before the 111<sup>th</sup> Congress begins in early January, and before the new President takes office on January 20, 2009. As a result, the new President would be unable to do what was done via the Card memorandum — direct federal agencies to extend the effective dates of any rules that had been published during the final days of the Bush Administration, but had not taken effect — since the rules would have already taken effect by the time the next President takes office.

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<sup>29</sup> General Accounting Office, *Regulatory Review: Delay of Effective Dates of Final Rules Subject to the Administration’s Jan. 20, 2001, Memorandum*, GAO-02-370R, February 15, 2002.

<sup>30</sup> As discussed later in this report, the Administrative Procedure Act allows an agency to avoid notice and comment procedures for rules of agency organization, procedure, or practice when an agency finds, for “good cause,” that those procedures are “impracticable, unnecessary, or contrary to the public interest.”

<sup>31</sup> Jeffrey S. Lubbers, ed., *A Guide to Federal Agency Rulemaking, Fourth Edition* (Chicago: ABA Publishing, 2006), pp. 121-122. For a discussion of these criticisms, see William M. Jack, “Taking Care That Presidential Oversight of the Regulatory Process is Faithfully Executed: A Review of Rule Withdrawals and Rule Suspensions Under the Bush Administration’s Card Memorandum,” *Administrative Law Review*, vol. 54 (Fall 2002), pp. 1479-1518. Some federal courts have considered any delay in a rule’s effective date to require notice and comment rulemaking. See *Natural Resources Defense Council, Inc. v. EPA*, 683 F.2d 752, 761 (3d Cir. 1982); and *Council of the Southern Mountains v. Donovan*, 653 F.2d 573 (D.C. Cir. 1981). One such action pursuant to the Card memorandum was rejected by a court. See *Natural Resources Defense Council v. Abraham*, 355 F.3d 179, 204-05 (2d Cir. 2004).

However, the OIRA data discussed previously indicate that at least some major rules could be published late enough that they may not take effect before January 20, 2009, thereby presenting an opportunity for their effective dates to be extended by the next administration.<sup>32</sup> One recent publication recommended that President-elect Obama do so.<sup>33</sup>

## New Rulemaking to Eliminate or Change Rules

If an agency has published a proposed rule, but has not published a final rule, the agency is under no obligation to issue a final rule unless required to do so by statute or court order. To preclude further action on a rule, the agency may wish to publish a notice in the *Federal Register* announcing its withdrawal of the rule.<sup>34</sup>

Once a final rule has been published in the *Federal Register*, the only way for an agency to change or undo the rule is by going back through the federal rulemaking process.<sup>35</sup> Under informal rulemaking procedures established by the Administrative Procedure Act (APA, 5 U.S.C. § 551 *et seq.*), agencies are generally required to publish a notice of proposed rulemaking (NPRM) in the *Federal Register*, allow “interested persons” an opportunity to comment on the proposed rule, and, after considering those comments, publish the final rule along with a general statement of its basis and purpose. The APA does not specify how long rules must be available for comment, but agencies commonly allow at least 30 days. The APA generally says that the final rule cannot become effective until at least 30 days after its publication.

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<sup>32</sup> See also Ralph Lindeman, “Agencies Continue to Propose New Rules After White-House Imposed June Deadline,” *BNA Daily Report for Executives*, August 11, 2008, p. A-9.

<sup>33</sup> OMB Watch, *Advancing the Public Interest Through Regulatory Reform: Recommendations for President-Elect Obama and the 111<sup>th</sup> Congress*, November 2008. The report was actually the product of a steering committee composed of 17 regulatory experts that was assembled by OMB Watch. Specifically, the report recommended the following: “Place a moratorium on finalizing new regulations, and review those rules finalized but not yet in effect, except those required by statutory deadlines, court order, or necessary to meet regulatory emergencies, for 60 days pending agency review and reconsideration.”

<sup>34</sup> These withdrawals are recorded in the *Unified Agenda of Federal Regulatory and Deregulatory Actions*, which is published twice a year by the Regulatory Information Service Center within the General Services Administration.

<sup>35</sup> Advocates of the “unitary executive” theory of presidential power assert that the President should be able to make the final decision regarding the substance of agency rules — even when Congress has assigned rulemaking responsibilities to agency officials. Even in those instances, however, it is the agency that must take the rulemaking action, not the President. The President cannot unilaterally eliminate or change a rule issued by an executive agency (e.g., by issuing an executive order), but advocates of the unitary executive and others assert that the President can generally direct an agency official to do so. For more on this issue, see testimony of Curtis W. Copeland, Specialist in American National Government, U.S. Congress, House Committee on the Judiciary, *Federal Rulemaking and the Unitary Executive Principle*, hearings, 110<sup>th</sup> Congress, 2<sup>nd</sup> sess., May 6, 2008 (available from the author).

However, the APA (5 U.S.C. § 553) states that full “notice and comment” procedures are not required when an agency finds, for “good cause,” that those procedures are “impracticable, unnecessary, or contrary to the public interest.” Agencies can also make their rules take effect in less than 30 days by invoking the “good cause” exception.<sup>36</sup> When agencies use the good cause exception, the APA requires that they explicitly say so and provide a rationale for the exception’s use when the rule is published in the Federal Register. The APA also provides explicit exceptions to the NPRM requirement for certain categories of regulatory actions, such as rules dealing with military or foreign affairs; agency management or personnel; or public property, loans, grants, benefits, or contracts. Further, the APA says that the NPRM requirements do not apply to interpretative rules; general statements of policy; or rules of agency organization, procedure, or practice.

Two procedures for noncontroversial and expedited rulemaking were designed not to involve NPRMs. “Direct final” rulemaking involves agency publication of a rule in the *Federal Register* with a statement that the rule will be effective on a particular date unless an adverse comment is received within a specified period of time (e.g., 30 days). However, if an adverse comment is filed, the direct final rule is withdrawn and the agency may publish the rule as a proposed rule under normal NPRM procedures. Direct final rulemaking can be viewed as a particular application of the APA’s good cause exception in which agencies claim NPRMs are “unnecessary.”<sup>37</sup> The other procedure is what is known as “interim final” rulemaking, in which an agency issues a final rule without an NPRM that is generally effective immediately, but with a post-promulgation opportunity for the public to comment. If the public comments persuade the agency that changes are needed in the interim final rule, the agency may revise the rule by publishing a final rule reflecting those changes. Interim final rulemaking can be viewed as another particular application of the good cause exception in the APA, but with the addition of a comment period after the rule has become effective.<sup>38</sup>

The legislative history of the APA makes it clear that Congress did not believe that the act’s good cause exception to the notice and comment requirements should be an “escape clause.”<sup>39</sup> A federal agency’s invocation of the good cause exception (or other exceptions to notice and comment procedures) is subject to judicial review. After having reviewed the totality of circumstances, the courts can and sometimes do determine that an agency’s reliance on the good cause exception was not authorized

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<sup>36</sup> The APA also allows rules to take effect in less than 30 days if the rule grants or recognizes an exemption or relieves a restriction, or if the rule is an interpretative rule or statement of policy.

<sup>37</sup> For more, see Ronald M. Levin, “More on Direct Final Rulemaking: Streamlining, Not Corner Cutting,” *Administrative Law Review*, 51 (Summer 1999), pp. 757-766.

<sup>38</sup> For more, see Michael Asimow, “Interim Final Rules: Making Haste Slowly,” *Administrative Law Review*, 51 (Summer 1999), pp. 703-755.

<sup>39</sup> Senate Committee on the Judiciary, *Administrative Procedure Act: Legislative History*, Senate Document 248, 79<sup>th</sup> Congress, 2<sup>nd</sup> sess. (1946).

under the APA.<sup>40</sup> The case law has generally reinforced the view that the good cause exception should be “narrowly construed.”<sup>41</sup> That said, GAO reported that about half of the 4,658 final rules published in 1997 were not preceded by an NPRM, and that, in these cases, the agencies most commonly cited the good cause exception.<sup>42</sup>

## Possible Congressional Approaches

Congress may examine proposed and final “midnight” regulations being issued at the end of the Bush Administration and conclude that they should be allowed to go forward. Should Congress conclude otherwise, though, various options are available — even for rules that have already taken effect.

### Congressional Review Act

Congress may use its general powers to overturn agency rules by regular legislation. However, for various reasons, Congress may find it difficult to do so. The Congressional Review Act (CRA), enacted in March 1996, was an attempt by Congress to reassert control over agency rulemaking by establishing a special set of expedited or “fast track” legislative procedures for this purpose, primarily in the Senate.<sup>43</sup>

In essence, the act requires that all final rules (including rules issued by independent boards and commissions) be submitted to both houses of Congress and to GAO before they can take effect. Members of Congress have 60 “days of continuous session” to introduce a joint resolution of disapproval after a rule has

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<sup>40</sup> For discussions of these court cases, see Ellen R. Jordan, “The Administrative Procedure Act’s ‘Good Cause’ Exemption,” *Administrative Law Review*, 36 (Spring 1984), pp. 113-178; and Catherine J. Lanctot, “The Good Cause Exception: Danger to Notice and Comment Requirements Under the Administrative Procedure Act,” *Georgetown Law Journal*, 68 (Feb. 1980), pp. 765-782.

<sup>41</sup> See *American Federation of Government Employees, AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981); and *Mobay Chemical Corp. v. Gorsuch*, (682 F.2d 419, 426 (3<sup>rd</sup> Cir.), cert. denied, 459 U.S. 988 (1982)). In another case (*Action on Smoking and Health v. CAB*, 713 F.2d 795, 800 (D.C. Cir. 1983)), the court said that allowing broad use of the good cause exception would “carve the heart out of the statute.”

<sup>42</sup> U.S. General Accounting Office, *Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules*, GAO/GGD-98-126, August 31, 1998.

<sup>43</sup> The following discussion is a synopsis of more detailed information provided in other CRS reports. For a detailed discussion of CRA disapproval procedures, see CRS Report RL31160, *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*, by Richard S. Beth. For a discussion of the “carryover” procedures, see CRS Report RL34633, *Congressional Review Act: Disapproval of Rules in a Subsequent Session of Congress*, by Curtis W. Copeland and Richard S. Beth. For a discussion of the implementation of the CRA, see CRS Report RL30116, *Congressional Review of Agency Rulemaking: An Update and Assessment of the Congressional Review Act After a Decade*, by Morton Rosenberg.

been submitted to Congress (hereafter referred to as the “initiation period”).<sup>44</sup> The Senate has 60 “session days” from the date the rule is submitted to Congress to use expedited procedures to act on a resolution of disapproval (hereafter referred to as the “action period”).<sup>45</sup> For example, once a joint resolution has reached the floor of the Senate, the CRA makes consideration of the measure privileged, prohibits various other dilatory actions, disallows amendments, and limits floor debate to 10 hours. If passed by both houses of Congress, the joint resolution is then presented to the President for signature or veto. If the President signs the resolution, the CRA specifies not only that the rule “shall not take effect” (or shall not continue if it has already taken effect), but also that the rule may not be reissued in “substantially the same form” without subsequent statutory authorization.<sup>46</sup> Also, the act states that any rule disapproved through these procedures “shall be treated as though such rule had never taken effect.”<sup>47</sup> If, on the other hand, the President vetoes the joint resolution, then (as is the case with any other piece of legislation) Congress can override the President’s veto by a two-thirds vote in both houses of Congress.

Under most circumstances, it is likely that the President would veto such a resolution in order to protect rules developed under his own administration, and it may also be difficult for Congress to muster the two-thirds vote in both houses needed to overturn the veto. Of the nearly 50,000 final rules that have been submitted to Congress since the legislation was enacted in March 1996, the CRA has been used to disapprove only one rule — the Occupational Safety and Health Administration’s November 2000 final rule on ergonomics.<sup>48</sup>

The March 2001 rejection of the ergonomics rule was the result of a specific set of circumstances created by a transition in party control of the presidency. The majority party in both houses of Congress was the same as the party of the incoming President (George W. Bush). When the new Congress convened in 2001 and adopted a resolution disapproving the rule published under the outgoing President (William J. Clinton), the incoming President did not veto the resolution. Congress may be

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<sup>44</sup> “Days of continuous session” excludes all days when either the House of Representatives or the Senate is adjourned for more than three days.

<sup>45</sup> “Session days” include only calendar days on which a chamber is in session. Once introduced, resolutions of disapproval are referred to the committees of jurisdiction in each house of Congress. The House of Representatives would consider the resolution under its general procedures, very likely as prescribed by a special rule reported from the Committee on Rules. In the Senate, however, if the committee has not reported a disapproval resolution within 20 calendar days after the regulation has been submitted and published, then the committee may be discharged of its responsibilities and the resolution placed on the Senate calendar if 30 Senators submit a petition to do so.

<sup>46</sup> 5 U.S.C. § 801(b)(2).

<sup>47</sup> 5 U.S.C. § 801(f).

<sup>48</sup> U.S. Department of Labor, Occupational Safety and Health Administration, “Ergonomics Program,” 65 *Federal Register* 68261, November 14, 2000. Although the CRA has been used to disapprove only one rule, it may have other, less direct or discernable effects (e.g., keeping Congress informed about agency rulemaking and preventing the publication of rules that may be disapproved).



most able to use the CRA to disapprove rules in similar, transition-related circumstances.<sup>49</sup>

**CRA “Carryover” Provisions.** The ergonomics disapproval was also an example of the “carryover” provisions in the CRA. Section 801(d) of the CRA provides that, if Congress adjourns its annual session *sine die* less than 60 *legislative days* in the House of Representatives or 60 *session days* in the Senate after a rule is submitted to it, then the rule is subject, during the following session of Congress, to (1) a new initiation period in *both* chambers and (2) a new action period in the Senate.<sup>50</sup> The purpose of this provision is to ensure that *both* houses of Congress have sufficient time to consider disapproving rules submitted during this end-of-session “carryover period.” In any given year, the carryover period begins after the 60<sup>th</sup> legislative day in the House or session day in the Senate before the *sine die* adjournment, whichever date is *earlier*. The renewal of the CRA process in the following session occurs even if no resolution to disapprove the rule had been introduced during the session when the rule was submitted.

For purposes of this new initiation period and Senate action period, a rule originally submitted during the carryover period of the previous session is treated as if it had been published in the *Federal Register* on the 15<sup>th</sup> legislative day (House) or session day (Senate) after Congress reconvenes for the next session. In each chamber, resolutions of disapproval may be introduced at any point in the 60 days of continuous session of Congress that follow this date, and the Senate may use expedited procedures to act on the resolution during the 60 days of session that follow the same date.

**The Second Session of the 110<sup>th</sup> Congress.** The exact starting point for the CRA carryover period in the second session of the 110<sup>th</sup> Congress can be determined only after *sine die* adjournment has taken place. However, the likely date or range of dates may be illuminated by examining congressional activity in prior years. Perhaps most relevantly, since the CRA was enacted in March 1996, the starting points for the carryover periods during second sessions of Congress have always been determined by the House of Representatives, and have ranged from May 12 to June 23, with the median starting point being June 7.<sup>51</sup>

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<sup>49</sup> See, for example, Susan E. Dudley, “Reversing Midnight Regulations,” *Regulation*, vol. 24 (Spring 2001), p. 9, who noted that the “veto threat is diminished [after a transition], since the president whose administration issued the regulations is no longer in office.” See also testimony of Curtis W. Copeland, in U.S. Congress, House Committee on Government Reform, Subcommittee on Regulatory Affairs, *The Effectiveness of Federal Regulatory Reform Initiatives*, 109<sup>th</sup> Cong., 1<sup>st</sup> sess., July 27, 2005, p. 13. See CRS Report RL30116, *Congressional Review of Agency Rulemaking: An Update and Assessment of the Congressional Review Act After a Decade*, by Morton Rosenberg, for a description of this and several other possible factors affecting the law’s use.

<sup>50</sup> “Legislative days” end each time a chamber adjourns and begin each time it convenes after an adjournment.

<sup>51</sup> For the cutoff dates in all recent sessions of Congress, see CRS Report RL34633, *Congressional Review Act: Disapproval of Rules in a Subsequent Session of Congress*, by (continued...)

There are some indications that the cutoff date for the carryover provisions in the second session of the 110<sup>th</sup> Congress may be even earlier. Again, it appears that the calendar for the House of Representatives will determine the cutoff date (because the Senate has been in session more days late in the year). If the House of Representatives meets for three days in November 2008 and then goes into recess until *sine die* adjournment, the 60<sup>th</sup> legislative day prior to adjournment will be May 14, 2008. Under these conditions, any final rule sent to Congress after May 14, 2008, will be subject to disapproval in the 111<sup>th</sup> Congress.

## Appropriations Provisions

Although the CRA has been used only once to overturn an agency rule, Congress has frequently used provisions added to agency appropriations bills to affect rulemaking and regulations. A CRS analysis of the Consolidated Appropriations Act for 2008 revealed nearly two dozen such provisions in the act, which generally fell into four categories: (1) prohibitions on the finalization of particular proposed rules, (2) prohibitions on the development of regulations with regard to particular statutes or issues, (3) restrictions on implementation or enforcement, and (4) conditional restrictions on the development or implementation of particular rules.<sup>52</sup> A review of appropriations legislation that was enacted from FY1999 through FY2007 indicated that many of the regulatory restrictions in the Consolidated Appropriations Act for 2008 had appeared in one or more appropriations statutes in previous years. Some were in relevant appropriations bills in all 10 years, some had been in multiple years (but not all 10), and some were present in only one year. In some cases, the provisions appear to have been designed to slow down or prevent the issuance of “midnight” rules issued near the end of a presidential administration, or to ensure the implementation of rules issued during that period.

These restrictions in appropriations bills illustrate that Congress can have a substantial effect on agency rulemaking and regulatory activity beyond the introduction of joint resolutions of disapproval pursuant to the CRA. However, unlike CRA joint resolutions of disapproval, these appropriations provisions cannot nullify an existing regulation (i.e., remove it from the *Code of Federal Regulations*) or permanently prevent the agency from issuing the same or similar regulations. Therefore, any final rule that has taken effect and been codified in the *Code of Federal Regulations* will continue to be binding law — even if language in the relevant regulatory agency’s appropriations act prohibits the use of funds to enforce the rule. Regulated entities are still required to adhere to applicable requirements (e.g., installation of pollution control devices, submission of relevant paperwork), even if violations are unlikely to be detected and enforcement actions cannot be taken by federal agencies.

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<sup>51</sup> (...continued)

Curtis W. Copeland and Richard S. Beth, pp. 7-9.

<sup>52</sup> CRS Report RL34354, *Congressional Influence on Rulemaking and Regulation Through Appropriations Restrictions*, by Curtis W. Copeland.

Also, unless otherwise indicated, regulatory restrictions in appropriations acts are binding only for the period of time covered by the legislation (i.e., a fiscal year or a portion of a fiscal year).<sup>53</sup> Therefore, any restriction that is not repeated in the next relevant appropriations act or enacted in other legislation is no longer binding on the relevant agency or agencies. However, some appropriations provisions are worded in such a way that they have essentially become permanent or multi-year requirements.

Most of the regulatory restrictions are in appropriations bills providing funds for particular agencies or groups of agencies. Therefore, the prohibitions are generally applicable only to the agencies funded by that appropriations measure. However, some of the regulatory prohibitions are in the “General Provisions — Government-wide” section of one of the appropriations measures (for FY2008, Title VII of the Financial Services and General Government Appropriations Act), and are, therefore, applicable to virtually all federal agencies. Other provisions are worded in such a way that their effects are broader than the agencies funded by those particular appropriations bills (e.g., those that prohibit the use of funds in “this or any other Act” to publish or implement regulations).<sup>54</sup>

On the other hand, some of the appropriations provisions limiting regulatory actions may not be as restrictive as they initially appear. Some federal regulatory agencies derive a substantial amount of their operating funds from sources other than congressional appropriations (e.g., user fees), and the use of those funds to develop, implement, or enforce rules may not be legally constrained by language preventing the use of appropriated funds.<sup>55</sup> Also, some federal regulations (e.g., many of those issued by the Environmental Protection Agency and the Occupational Safety and Health Administration) are primarily implemented or enforced by state or local governments, and those governments may have sources of funding that are independent of the federal funds that are restricted by the appropriations provisions. Some state or local governments may also have their own statutory and regulatory requirements that are the same as or similar to the federal rules at issue, or may even

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<sup>53</sup> See U.S. General Accounting Office, *Principles of Appropriations Law, Third Edition, Volume I*, GAO-04-261SP, (January 2004), p. 2-34, which states that, “Since an appropriation act is made for a particular fiscal year, the starting presumption is that everything contained in the act is effective only for the fiscal year covered. Thus, the rule is: A provision contained in an annual appropriation act is not to be construed to be permanent legislation unless the language used therein or the nature of the provision makes it clear that Congress intended it to be permanent.”

<sup>54</sup> See U.S. General Accounting Office, *Principles of Appropriations Law*, p. 2-33, which says that a general provision “may apply solely to the act in which it is contained (‘No part of any appropriation contained in this Act shall be used ...’), or it may have general applicability (‘No part of any appropriation contained in this or any other Act shall be used ...’).”

<sup>55</sup> Others, however, take the view that even these non-appropriated funds must be at least figuratively deposited into the Treasury, and that “all spending in the name of the United States must be pursuant to legislative appropriation.” Kate Stith, “Congress’ Power of the Purse,” *The Yale Law Journal*, vol. 97 (1988), p. 1345.

go beyond federal standards.<sup>56</sup> If state or local funds or legal authorities are used to develop, implement, or enforce regulations, those actions would not appear to be constrained by statutory provisions limiting the use of *federal* funds to restrict action on particular *federal* laws and regulations.<sup>57</sup>

Agencies may also find ways around provisions prohibiting the use of appropriated funds for rulemaking or other regulatory actions. For example, if an agency is not permitted to use its appropriation to issue a formal rule on a particular issue, it might attempt to achieve the end result through other means (e.g., a guidance document that, while technically having no binding effect, may be granted great deference by affected parties).<sup>58</sup> More generally, if Congress restricts one agency or group of agencies from issuing a rule on a particular topic, another agency with similar or overlapping statutory authority may be assigned that responsibility.

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<sup>56</sup> For example, under the Occupational Safety and Health Act, states may set standards for hazards such as ergonomic injury for which no federal standard has been established. See U.S. General Accounting Office, *Regulatory Programs: Balancing Federal and State Responsibilities for Standard Setting and Implementation*, GAO-02-495, March 2002.

<sup>57</sup> See U.S. Government Accountability Office, *Principles of Federal Appropriations Law, Third Edition, Volume II*, GAO-06-382, February 2006, which says that, unless stated otherwise, expenditures by recipients of federal grants “are not subject to all the same restrictions and limitations imposed on direct expenditures by the federal government. For this reason, grant funds in the hands of a grantee have been said to largely lose their character and identity as federal funds.”

<sup>58</sup> See Office of Management and Budget, “Final Bulletin for Agency Good Guidance Practices,” 72 *Federal Register* 3432, January 25, 2007. OMB issued the bulletin, in part, because of concerns that agencies were treating guidance documents as binding rules. Nevertheless, as OMB points out, guidance documents can have significant effects on regulated entities.