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January 4, 2017

Representative
U.S. House of Representatives
Washington, DC 20515

RE: Oppose Midnight Rules Act, H.R. 21

Dear Representative,

The National Consumer Law Center® (NCLC®), on behalf of its low income clients, strongly opposes H.R. 21, the Midnight Rules Relief Act (MRRA), which would amend the Congressional Review Act (CRA) to allow disapproval *en masse* of all regulations finalized near the end of presidential terms.. Since 1969, the nonprofit NCLC has worked for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the U.S. through its expertise in policy analysis and advocacy, publications, litigation, expert witness services, and training.

The MRRA is based on a fatally flawed premise—namely, that regulations which are proposed or finalized during the so-called "midnight" rulemaking period are rushed and inadequately vetted. In fact, the very opposite is true. There are currently dozens of public health and safety regulations that have been in the regulatory process for years or decades, including many that date from the Obama Administration's first term or implement laws passed in the first term. Some even predate this Administration entirely.

A Public Citizen report[1] found that rules issued during the presidential transition period spent *even more time* in the rulemaking process and received *even more extensive vetting* than other rules. After examining all economically significant rulemakings that have been finalized since 1999, Public Citizen's report found that rules issued during the transition period took on average 3.6 years to complete – almost an entire presidential term – compared to 2.8 years for all other rules. Likewise, the time it took the U.S. Office of Information and Regulatory Affairs (OIRA) to review midnight rules was no shorter, and in some cases longer, than non-midnight rules.

In addition, many of these regulations are mandated by Congress and have missed rulemaking deadlines prescribed by Congress. Referring to regulations that have been under consideration by federal agencies for years, and in some instances decades, as "rushed" is misleading and false.

Prominent administrative law experts have also concluded that the concerns regarding these regulations are not borne out by the evidence. For example, in 2012 the Administrative Conference of the United States (ACUS) conducted an extensive study of regulations finalized near the end of previous

[1] Public Citizen, Shining A Light On The "Midnight Rule" Boogeyman: An Analysis Of Economically Significant Rules Reviewed By OIRA (July, 2016), http://citizen.org/documents/Midnight-Regs-Myth.pdf.

presidential terms and found that many "midnight regulations" were "relatively routine matters not implicating new policy initiatives by incumbent administrations."[2]

ACUS also found that the "majority of the rules appear to be the result of finishing tasks that were initiated before the Presidential transition period or the result of deadlines outside the agency's control (such as year-end statutory or court- ordered deadlines)." ACUS concluded that "the perception of midnight rulemaking as an unseemly practice is worse that the reality."

Indeed, opponents of midnight regulations have not presented any persuasive empirical evidence supporting claims that regulations finalized near the end of presidential terms were rushed or did not involve diligent compliance with mandated rulemaking procedures. Instead, those opponents make unsubstantiated claims based solely on when a regulation was finalized, ignoring the marathon rulemaking process that those rules likely underwent

In reality, compliance with the current lengthy regulatory process prevents agencies from finalizing new regulations efficiently, and thus earlier in presidential terms. This is because many of the regulations that Congress intended to provide the greatest benefits to the public's health, safety, financial security, and the environment currently take several years,[3] decades in some instances, for agencies to implement due to the extensive and, in many cases, redundant procedural and analytical requirements that comprise the rulemaking process.

In the end, it is difficult to overlook the tragic irony at the heart of the MRRA. The bill would empower Congress to use the rushed and nontransparent CRA process to block at the 11th hour rules that have completed the journey through the onerous rulemaking process.

Unlike the CRA's expedited procedures, agency rules are subjected to myriad accountability mechanisms, and, for each rule, the agency must articulate a policy rationale that is supported by the rulemaking record and consistent with the requirements of the authorizing statute. In contrast, members of Congress do not have to articulate a valid policy rationale—or any rationale at all—in support of CRA resolutions of disapproval. Quite simply, they can be, and often are, an act of pure politics.

The MRRA would make the situation even worse. It would, in effect, demand that all members of Congress have adequate expertise on all of the rules that would be targeted by a single *en masse* disapproval resolution. Such a scenario would be highly unlikely.

It would also risk encouraging members to engage in "horse trading" to add still more rules to the *en masse* disapproval resolution until enough votes have been gathered to ensure the resolution's passage. Surely, this approach to policymaking cannot be defended as superior to that undertaken by regulatory agencies.

We strongly urge opposition to the Midnight Rules Relief Act.

Sincerely,

Lauren Saunders,
Associate Director

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[2] Administrative Conference Recommendation 2012-2, Midnight Rules, Adopted June 14, 2012, pp. 1-2, at http://www.acus.gov/wp-content/uploads/downloads/2012/06/Final-Recommendation-2012-2-Midnight-Rules.pdf

[3] Public Citizen, Unsafe Delays: An Empirical Analysis Shows That Federal Rulemakings To Protect The Public Are Taking Longer Than Ever (June 2016), http://www.citizen.org/documents/Unsafe-Delays-Report.pdf.