The Risks of Regulating in the Dark

By Sofie E. Miller

Note from the Editor:

This article argues that regulations passed in the final weeks of an outgoing president's term are often inferior because they are issued hastily; it argues that the Department of Energy's regulations establishing efficiency standards for washing machines in January 2001 are a prime example of this phenomenon.

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• Margaret Taylor, C. Anna Spurlock, Hung-Chia Yang, *Confronting Regulatory Cost and Quality Expectations: An Exploration of Technical Change in Minimum Efficiency Performance Standards*, Resources for the Future Disscussion Paper (Nov. 6, 2015), http://www.rff.org/research/publications/confronting-regulatory-cost-and-quality-expectations-exploration-technical.

• Cheryl Bolen, *Obama Regulatory Chief Rejects Midnight Regulation*, Bloomberg BNA (Dec. 7, 2016), https://www.bna.com/obama-regulatory-chief-n73014448176/.

• Elizabeth Kolbert, *Midnight Hour*, The New Yorker (Nov. 24, 2008), http://www.newyorker.com/magazine/2008/11/24/midnight-hour.

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The promise—or threat—of midnight regulations looms now, in the final days of the Obama administration. "Midnight" regulations are those issued after the November presidential election but before Inauguration Day as the outgoing administration attempts to finalize its regulatory policy priorities with a surge of rulemaking activity. This significant uptick in regulation, so common at the end of presidential administrations, is likely to affect more than just the number of pages in the Federal Register. Scholars have theorized that midnight rules are problematic because they short-circuit important procedural safeguards that ensure high-quality regulatory outcomes, like rigorous analysis, internal and external review, and public input in the rulemaking process. Stepping beyond theory, recent examples—such as the Department of Energy's energy efficiency standards for clothes washers—illustrate that midnight rules impose real burdens. This article retrospectively examines DOE's midnight regulation and its effects on consumers.

I. Measuring Midnight

Midnight regulations can pose a number of problems for the development of sound regulatory policy. For example, the Office of Information and Regulatory Affairs (OIRA) reviews proposed and final rules before they are published, acting as a final check on subpar agency analysis before it becomes binding policy. Using empirical methods, Mercatus Center economist Patrick McLaughlin has found that the mean review time of all regulations decreases by two thirds of a day for each additional economically significant rule that OIRA must review during the midnight period.[1] But how important are those two-thirds of a day to the overall quality of a rule? Can that additional time for review and analysis make the crucial difference between good and bad rules?

To answer that question, some scholars have attempted to measure the relationship between a rule's quality and whether it is issued during the midnight period. Based on their study of this relationship, McLaughlin and his colleague Jerry Ellig find that rules reviewed by OIRA during "midnight" are among those with the lowest quality of analysis[2]—presumably because of the additional pressures on OIRA time and staff resources during the post-election rulemaking crunch. In examining a dataset of 109 major rules, researchers Stuart Shapiro and John Morrall conclude that midnight rules have much smaller net benefits than rules issued during other points of time throughout an administration.[3]

These empirical studies line up with real world examples which suggest that the shortcuts associated with midnight

1 Patrick A. McLaughlin, *The Consequences of Midnight Regulations and Other Surges in Regulatory Activity*, 147 Pub. Choice Issue 3 (2011).

2 Patrick McLaughlin & Jerry Ellig, *Does Haste Make Waste in Regulatory Analysis?*, Social Science Research Network (2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1646743.

3 Stuart Shapiro & John Morrall, *The Triumph of Regulatory Politics: Benefit Cost Analysis and Political Salience*, 6 Reg. & Governance Issue 2

rulemaking lead to worse regulatory outcomes. In fact, the recent emphasis on retrospective evaluation of existing rules, initiated by President Obama's Executive Order 13,563, provides a key opportunity to assess the actual effects of regulations that were finalized around midnight during previous administrations.[4]

II. Wishy-Washy Analysis

One prime candidate for such retrospective examination is the Department of Energy's midnight rule—passed at the tail end of President Clinton's second term, right before George W. Bush took office—establishing energy and water efficiency standards for residential clothes washers. The rule was published on January 12, 2001, just 99 days after it was proposed and 39 days after the DOE received the last public comment on its proposal.[5] The DOE projected that its rule would increase clothes washer energy efficiency by as much as 35%, increasing the price of new clothes washers by $249, but saving consumers money on their utility bills.[6] However, these rosy projections were based on faulty analysis that grossly overestimated how often consumers wash their clothes, and resulted in standards that left consumers paying more money for worse products (not to mention moldy clothes).

Efficient appliances are more expensive than less efficient versions, but they can save consumers more money over the long term the more frequently they are used. As a result, households with high frequency of use are more likely to benefit from investing in more efficient appliances than households with lower frequency of use. In proposing its energy efficiency standards for clothes washers, the DOE calculated large net benefits by estimating that an average household operates its clothes washer a whopping 392 times per year, or more than once per day on average.[7]

While this may be realistic for large families or households with small children, it doesn't represent most households' appliance usage.[8] Even based on the DOE's original assumptions, households with lower frequency of use—including couples or single residents—would be expected to bear net costs as a result of the DOE's mandate for efficient (and more expensive) appliances. The payoff from more efficient appliances depends on individual household characteristics,[9] and the DOE's flawed assumptions about clothes washer use resulted in standards with large net costs for the vast majority of U.S. households.[10]

In fact, according to calculations submitted to the DOE in comments on the proposed rule by the Mercatus Center based on the DOE's data, any household that uses its clothes washer fewer than 300 times per year (or 5.8 times per week) would see a net cost as a result of the DOE's standard. A Rasmussen Research survey of 1,997 consumers conducted in 2000 found that only 15% of respondents used their clothes washers as frequently as the DOE assumed, and nearly 70% of respondents did not use them frequently enough to recoup the upfront cost of the new efficient machines mandated by the standard.[11] This finding is supported by the federal government's 2009 Residential Energy Consumption Survey, which calculated that U.S. households run their clothes washers about 282 times per year on average.[12]

All this means that the DOE used a ridiculously inflated assumption about household clothes washer usage to justify new efficiency standards for residential clothes washers. As a result, 70% of U.S. consumers bore net costs rather than the enormous net benefits that the DOE anticipated. But these monetary costs were just the beginning of the negative effects of this midnight regulation for Americans.

III. Something Is Rotten in the State of Kenmore

The DOE's final rule for residential clothes washers increased their energy efficiency by 35% and reduced the water that they are allowed to use by 18.1 gallons per cycle.[13] The Department estimated in 2000 that these savings were sufficient to save 5.52 quadrillion British thermal units (BTUs) of energy through 2030 and 11 trillion gallons of water over 25 years. As a result of these substantial energy and water savings, the DOE estimated that its rule would result in $15.3 billion in net benefits to Americans—mostly in the form of lower utility bills—through 2030.[14] However, these estimates seemed to miss one crucial constraint: energy and water are exactly what clean clothes. What effect does it have on consumer welfare to cap the inputs that are required for clean laundry?

Significantly reducing how much power and water clothes washers can use has a very tangible effect on consumers: mold, mildew, bad odors, and ruined laundry. After the DOE's new standard was adopted, front-loading washers could no longer effectively clean themselves through the typical wash cycle and, as

(2012).

4 Exec. Order No. 13,610, 3 C.F.R. 258 (2013).

5 Energy Conservation Program for Consumer Products: Clothes Washer Energy Conservation Standards, 66 Fed. Reg. 3,313 (January 12, 2001).

6 65 Fed. Reg. 59,549.

7 65 Fed. Reg. 59,561.

8 According to calculations by the Mercatus Center based on the DOE's data, such infrequent use would not make an efficient clothes washer a cost-beneficial purchase for my household, or any household that uses its clothes washer fewer than 300 times per year. *See infra* note 11 for additional information.

9 Sofie E. Miller & Brian F. Mannix, *One Standard to Rule Them All: The Disparate Impact of Energy Efficiency Regulations*, in Nudge Theory in Action: Behavioral Design in Policy and Markets (Sherzod Abdukadirov ed., 2016).

10 By way of illustration: my mother, who has nine children, used to run the clothes washer as frequently as three times a day. Given this frequency-of-use, she may have been able to recoup the higher cost of an efficient clothes washer through reductions in her energy and water bills. On the other hand, my current household of two runs the clothes washer once per week on average; in our case, it's not likely that a more efficient—and more expensive—washer will be worth the investment.

11 Mercatus Ctr. At Geo. Mason Univ., Addendum to Public Interest Comment on the Department of Energy's Proposed Clothes Washer Efficiency Standards (2000), http://mercatus.org/sites/default/files/publication/Clothes_Washer_Standards.pdf.

12 Energy Info Admin., U.S. Dept. of Energy, *Residential Energy Consumption Survey* (2009).

13 66 Fed. Reg. 3,313.

14 65 Fed. Reg. 59,551.

a result, detergent suds and laundry residue would build up and molder in the washer door seals and drums. Consumers began noting strange smells emanating from their efficient Whirlpool, Kenmore, and Maytag washing machines, leading to the hassles of ruined laundry, ongoing maintenance, and service calls.

Consumers' product options in the marketplace were restricted by the DOE's midnight regulation, meaning it wasn't a simple task to replace a faulty efficient washer with a new, effective one. However, consumers had other options—they could, for example, buy new low-sudsing detergents manufactured specifically for high-efficiency washers. Or they could buy a cleaning product specifically designed to address moldy washing machines; Whirlpool began to sell a cleaning product of its own, Affresh, which was intended to remedy its efficient machines' design flaws by removing odor-causing residue. Other appliance manufacturers, including Amana, recommend that customers purchase Affresh to remove and prevent "odor-causing residue that can occur in all brands of HE [high efficiency] washers."[15]

According to the 6th Circuit Court of Appeals, Whirlpool expected to reap $195 million in revenue by marketing Affresh to consumers who had purchased faulty washers, all while continuing to sell 200,000 of those faulty washers per year.[16] Meanwhile, consumers continued to pay higher prices for worse washing machines while paying extra for high-efficiency detergent, mildew cleaning products, and service requests to fix what they had already paid for.

Consumer Reports and other resources provide consumers with a laundry list of home remedies:

- Leaving the washer door open allows a front-loading washer to dry out between cycles. This is especially relevant since front-loading washers, unlike top-loading washers, require a tight seal—but an effective seal isn't likely to allow the interior to dry out between washes. As simple as this solution sounds, leaving the washer door open poses a safety issue in homes with small children or pets, who may be tempted to climb inside. Court documents reported that a young child drowned in a Kenmore front-loading machine manufactured by Whirlpool (and the CPSC opened a safety investigation for front loading machines).
- Consumers are advised to conduct regular hot water flushes with bleach to eradicate mold and mildew. Even consumers whose washers are not yet showing signs of contamination are advised to run a hot water cycle with bleach at least once per month to prevent mold and mildew growth. Running frequent hot water cycles in an empty washing machine tends to use a fair amount of both energy and water. EPA granted Whirlpool an Energy Star certification for its front-loading washers, but without incorporating the additional water and energy use required for the hot water flushes needed for regular maintenance.
- Consumers also have the option to wipe down the washer interior and door gasket, along with cleaning the detergent dispenser to address interior mold. While at least this option comes without an explicit price tag, this additional upkeep requires significant time, effort, and elbow grease, clearly an unwanted extra maintenance burden for consumers who rightfully expect that their clothes washers will work on their own to clean clothes.
- If all else fails, consumers are advised to avail themselves of service calls. In fact, Whirlpool paid Sears a substantial indemnity—over $100 million—for service calls to address mold issues, indicating that this option was neither infrequently used nor costless to implement.

Consumers bore a significant burden as a result of their moldy washers, whether measured in time, effort, expense, safety, or inconvenience. These costs, which we can easily identify after the fact, were apparently not considered by regulators before they hastily finalized this midnight regulation. While Whirlpool only received complaints on 3% of its washers, the problems were apparently endemic, affecting approximately 5.5 million consumers who purchased any of the implicated 83 models manufactured or marketed by Whirlpool, Maytag, and Kenmore.[17]

IV. The Indirect Costs of Dirty Laundry

How can we retrospectively quantify the extent to which consumers suffered from the DOE's midnight rule? Ten years ago, this question passed from the theoretical realm and into the courts. Consumers, plagued by moldy clothes washers and laundry that was never quite clean anymore, took their cases to the courts, where the U.S. Courts of Appeals for the 6th and 7th Circuits eventually ruled that the cases should go forward as a class action lawsuit. In 2014, this determination reached the Supreme Court, which declined to overrule the circuit courts, and the class action lawsuit proceeded.[18]

On August 25, 2016, the U.S. District Court for the Northern District of Ohio filed a joint motion for final approval of a nationwide class-action settlement agreement between Whirlpool Corporation, Sears Holdings Corporation, and plaintiffs in the front-loading washing machine class action cases.[19] This wide-ranging settlement affects millions of consumers who bought faulty front-loading washers made from 2001 to 2010, including Whirlpool, Maytag, and Kenmore branded products.

15 *CLEANERS, Affresh*® Washer Cleaner, Amana, https://amana.com/accessories/laundry/cleaners/affresh__174_washer_cleaner_w10135699.pro.

16 Emily Bazelon, *The Case of the Moldy Washing Machines*, Slate (July 26, 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/07/whirpool_s_moldy_washing_machines_america_s_most_important_class_action.html.

17 *Settlement Agreement Exhibit 2: List of Access and Horizon Washer Models Included in Proposed Settlement Class* (April 18, 2016), http://www.washersettlement.com/pdf/Eligible_Washer_Models.pdf.

18 Sears, Roebuck and Co. v. Butler, 727 F.3d 796 (7th Cir. 2013), cert. denied, 134 S.Ct. 1277 (U.S. Feb. 24, 2014) (No. 13-430); Whirlpool Corp. v. Glazer, 722 F.3d 838 (6th Cir. 2013), cert. denied, 134 S.Ct. 1277 (U.S. Feb. 24, 2014) (No. 13-431).

19 U.S. District Court for the Northern District of Ohio, *Joint Motion for Final Approval of Class Action Settlement, Case No. 08-wp-65000*, Washer Settlement (Aug. 25, 2016), http://www.washersettlement.com/pdf/Joint_Motion_for_Final_Approval_of_Class_Action_Settlement.pdf.

The DOE, whose standards forced many families to switch from top-loading to more expensive front-loading washing machines, is notably absent from the list of defendants. Although consumers in the class action suit didn't realize it, their moldy washer problem began with the Department of Energy.

The lawsuit stated that the washers did not clean themselves properly of laundry residue, which resulted in odors and mold. But what is the monetary value of this harm to consumers? By way of answering that question, the court's settlement qualifies affected owners for a cash payment of $50, a rebate of 20 percent off the purchase of a new clothes washer or dryer, or up to $500 in reimbursements for expenses incurred for repairs or replacing a washing machine due to mold or odors. If all affected consumers opted for even the smallest settlement offered, the cost would be $275 million. These indirect costs are in addition to the direct costs of the rule—for example, the extra $249 that the DOE estimates consumers had to spend on washing machines because of its efficiency rule, or the fact that the vast majority of households didn't use their machines often enough to break even on the more efficient machines. All of this suggests that retrospective analysis of the DOE's efficiency standards by Margaret Taylor and her coauthors, which finds that the DOE *overestimated* the costs of complying with the clothes washer standards, misses the mark.[20]

V. The High Price of Energy Efficiency

Bad regulations and faulty analysis carry a price. In this case, the price that consumers paid as a result of rushed midnight rulemaking wasn't just theoretical: families paid more for their clothes washers and, instead of the promised benefits, the appliances brought additional costs and other trouble. Households bore costs in the form of higher prices, continued inconvenience, expense, time, and bad odors from moldy washing machines. The recent court settlement illustrates that consumers bear burdens—including indirect burdens—as a result of regulation gone awry. This leaves Whirlpool and Maytag liable for the moldy machines, while the DOE can wash its hands of the unanticipated indirect costs of complying with its rushed efficiency standard for clothes washers.

The DOE's energy efficiency regulation wasn't a minor policy change; it applies to the millions of U.S. households that use clothes washers to do their laundry, restricting their options and imposing higher costs in the form of higher prices and ongoing maintenance and upkeep. Furthermore, over 70% of these households ended up paying a net cost because they didn't save enough money on their utility bills to offset the higher prices of efficient washers. Examination of the Spring 2016 Unified Agenda suggests that the DOE wasn't deterred by the effects of its clothes washer rule: the agency plans to take action on 12 proposed and 13 final energy efficiency standards through Spring 2017. We will be waiting with bated breath to find out whether the DOE's next midnight rules will hang consumers out to dry.

20 Margaret Taylor, C. Anna Spurlock, Hung-Chia Yang, *Confronting Regulatory Cost and Quality Expectations: An Exploration of Technical Change in Minimum Efficiency Performance Standards*, Resources for the Future Disscussion Paper (Nov. 6, 2015), http://www.rff.org/research/publications/confronting-regulatory-cost-and-quality-expectations-exploration-technical.