



Administrative Conference Recommendation 2012-2

Midnight Rules

Adopted June 14, 2012

There has been a documented increase in the volume of regulatory activity during the last months of presidential terms.¹ This includes an increase in the number of legislative rules (normally issued under the Administrative Procedure Act's (APA) notice and comment procedures)² and non-legislative rules (such as interpretive rules, policy statements, and guidance documents) as compared to other periods. This spurt in late-term regulatory activity has been criticized by politicians, academics, and the media during the last several presidential transitions. However, the perception of midnight rulemaking as an unseemly practice is worse than the reality.

The Conference has found that a dispassionate look at midnight rules³ issued by past administrations of both political parties reveals that most were under active consideration long before the November election and many were relatively routine matters not implicating new

¹ One study shows that, as measured by Federal Register pages, rulemaking activity increases by an average of 17 percent in the three months following a presidential election. See Antony Davies & Veronique de Rugy, *Midnight Regulations: An Update* (Mercatus Ctr. at George Mason Univ., Working Paper, 2008), available at http://mercatus.org/uploadedFiles/Mercatus/Publications/WP0806_RSP_Midnight%20Regulations.pdf (studying the number of pages published in the Federal Register over specific time periods in various presidential administrations).

² See 5 U.S.C. § 553.

³ The U.S. House of Representatives' Subcommittee on Commercial and Administrative Law has previously suggested midnight rules as a topic suitable for Conference study. See H. SUBCOMM. ON COMMERCIAL & ADMIN. LAW, 109TH CONG., INTERIM REPORT ON ADMINISTRATIVE LAW, PROCESS AND PROCEDURE FOR THE 21ST CENTURY 150 (Comm. Print 2007). (listing among "Areas for Additional Research" the following question : "Should a new President be authorized to stay the effectiveness of 'midnight rules' that are promulgated shortly before a new administration takes office? If so, should there be limits on the amount of time rules can be delayed").



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policy initiatives by incumbent administrations.⁴ The Conference's study found that while there are isolated cases of midnight rules that may have been timed to avoid accountability⁵ 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). Accordingly, it appears that the increase in rulemaking at the end of an administration likely results primarily from external delays, the ordinary tendency to work to deadline, or simply a natural desire to complete projects before departing. Nonetheless, the timing of such rulemaking efforts can put a new administration in the awkward position of having to expeditiously review a substantial number of rules and other actions to assess the quality and consistency with its policies.

In addition, critics have suggested that administrations have used the midnight period for strategic purposes. First, administrations are said to have reserved particularly controversial rulemakings for the final months of an incumbent President's term in order to minimize political accountability and maximize influence beyond the incumbent administration's term. Such strategic timing is said to weaken the check that the political process otherwise provides on regulatory activity. Second, there is some concern about the quality of rules that may have been rushed through the rulemaking process. Third, some fear that midnight rulemaking forces incoming administrations to expend substantial time, energy, and political capital to reexamine the rules and address perceived problems with them. Although similar concerns have been raised with respect to non-legislative rules issued during the midnight period, such rules are not the focus of this Recommendation because they can be modified or amended without notice and comment procedures.

⁴ See Jack M. Beermann, *Midnight Rules: A Reform Agenda* (Feb. 8, 2012) (report to the Administrative Conference of the U.S.), available at <http://www.acus.gov/wp-content/uploads/downloads/2012/02/Midnight-Rules-Draft-Report-2-8-12.pdf>.

⁵ See, e.g., Beermann, *Midnight Rules*, *supra* note 4, at 28 n. 74, 54 n. 137 (citing examples of cases where an incumbent administration may have timed a midnight rule to avoid accountability).



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Given these criticisms, there have been many proposals to reform midnight rulemaking, some directed at limiting the ability of incumbent administrations to engage in it, some directed at enhancing the ability of incoming administrations to revise or rescind the resulting rules, and others directed at encouraging incumbent and incoming administrations to collaborate and share information during the rulemaking process.

The Conference believes that although it may be desirable to defer significant and especially controversial late-term rulemakings until after the transition of a presidential administration, shutting the rulemaking process down during this period would be impractical given that numerous agency programs require constant regulatory activity, often with statutory deadlines. Thus, the Conference believes that reforms directed at curtailing midnight rules should be aimed as precisely as possible at the activities that raise the greatest causes for concern. Reforms should target the problems of perceived political illegitimacy that arise from rules that are initiated late in the incumbent administration's term or that appear to be rushed through the regulatory process.

Accordingly, this Recommendation proposes reforms aimed at addressing problematic midnight rulemaking practices by incumbent administrations and enhancing the ability of incoming administrations to review midnight rules. This Recommendation defines "midnight rules" as those promulgated by an outgoing administration after the Presidential election. It is directed at addressing midnight rulemaking of "significant" legislative rules,⁶ although the considerations that underlie it may apply to other agency regulatory activities that affect the public.

⁶ Executive Order 12,866 defines a rule as "significant" when it is likely to 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; create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order." Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).



RECOMMENDATION

Recommendations to Incumbent Presidential Administrations

1. Incumbent administrations should manage each step of the rulemaking process throughout their terms in a way that avoids an actual or perceived rush of the final stages of the process.

2. Incumbent administrations should encourage agencies to put significant rulemaking proposals out for public comment well before the date of the upcoming presidential election and to complete rulemakings before the election whenever possible.

3. When incumbent administrations issue a significant “midnight” rule—meaning one issued by an outgoing administration after the Presidential election—they should explain the timing of the rule in the preamble of the final rule (and, if feasible, in the preamble of the proposed rule). The outgoing administration should also consider selecting an effective date that falls 90 days or more into the new administration so as to ensure that the new administration has an opportunity to review the final action and, if desired, withdraw it after notice and comment, before the effective date.

4. Incumbent administrations should refrain from issuing midnight rules that address internal government operations, such as consultation requirements and funding restrictions, unless there is a pressing need to act before the transition. While incumbent administrations can suggest such changes to the incoming administration, it is more appropriate to leave the final decision to those who would operate under the new requirements or restrictions.

5. Incumbent administrations should continue the practice of sharing appropriate information about pending rulemaking actions and new regulatory initiatives with incoming administrations.

Recommendations to Incoming Presidential Administrations



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6. Where an incoming administration undertakes to review a midnight rule that has already been published, and the effective date of the rule is not imminent, the administration should, before taking any action to alter the rule or its effective date, allow a notice-and-comment period of at least 30 days. The comment period should invite the public to express views on the legal and policy issues raised by the rule as well as whether the rule should be amended, rescinded, delayed pending further review by the agency, or allowed to go into effect. The administration should then take account of the public comments in determining whether to amend, rescind, delay the rule, or allow the rule to go into effect. If possible, the administration should initiate, if not complete, any such process prior to the effective date of the rule.

7. When the imminence of the effective date of a midnight rule precludes full adherence to the process described in paragraph six, the incoming administration should consider delaying the effective date of the rule, for up to 60 days to facilitate its review, if such an action is permitted by law.⁷ Before deciding whether to delay the effective date, however, the administration should, where feasible, allow at least a short comment period regarding the desirability of delaying the effective date. If the administration cannot provide a comment period before delaying the effective date of the rule, it should instead offer the public a subsequent opportunity to comment on when, if ever, the rule should take effect and whether the rule itself should be amended or rescinded.

Recommendation to Congress

8. In order to facilitate incoming administrations' review of midnight rules that would not otherwise qualify for one of the APA exceptions to notice and comment, Congress should consider expressly authorizing agencies to delay for up to 60 days, without notice and comment, the effective dates of such rules that have not yet gone into effect but would take effect within the first 60 days of a new administration.

⁷ The Conference takes no position on whether—absent legislation such as paragraph eight suggests—the law authorizes administrations to delay the effective dates of rules not yet effective without notice and comment, but recognizes that prior administrations have done so.



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Recommendation to the Office of the Federal Register

9. The Office of the Federal Register should maintain its current practice (whether during the midnight period or not) of allowing withdrawal of rules before filing for public inspection and not allowing rules to be withdrawn once they have been filed for public inspection or published, absent exceptional circumstances.