



Midnight Rules

Committee on Rulemaking

Proposed Recommendation | June 14-15, 2012

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

9 The Conference has found that a dispassionate look at midnight rules issued by past
10 administrations of both political parties reveals that most were under consideration long before
11 the November election and many were relatively routine matters not implicating new policy
12 initiatives by incumbent administrations.³ The Conference's study found that while there are
13 isolated cases of midnight rules that may have been timed to avoid accountability or that
14 represent efforts to extend the incumbent administration's policies into the future, most of the
15 rules appear to be the result of finishing tasks that have been inevitably delayed or derailed by

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, March 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 See Jack M. Beermann, *Midnight Rules: A Reform Agenda* (Draft Report Prepared for the Administrative Conference of the United States), available at <http://www.acus.gov/wp-content/uploads/downloads/2012/02/Midnight-Rules-Draft-Report-2-8-12.pdf>.



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16 the transition in presidencies. Accordingly, it appears that the increase in rulemaking at the end
17 of an administration likely results primarily from ordinary procrastination and external delays,
18 or simply a natural desire to complete projects before departing. Nonetheless, midnight
19 rulemaking can put a new administration in the awkward position of having to review a
20 substantial group of rules and other actions to ensure quality and consistency with its policies.

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

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

38 The Conference believes that although it may be desirable to defer significant and
39 especially controversial late-term rulemakings until after the transition of a presidential
40 administration, shutting the rulemaking process down during this period would be impractical
41 given that numerous agency programs require constant regulatory activity, often with



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42 congressional deadlines. Thus, the Conference believes that reforms directed at curtailing
43 midnight rules should be aimed as precisely as possible at the activities that raise the greatest
44 causes for concern. Reforms should target the problems of perceived political illegitimacy that
45 arise from rules that that are initiated late in the incumbent administration’s term or that
46 appear to be rushed through the regulatory process.

47 Accordingly, this Recommendation proposes reforms aimed at addressing midnight
48 rulemaking that focus on curbing problematic rulemaking by incumbent administrations and
49 enhancing the ability of incoming administrations to review midnight rules. It defines “midnight
50 rules” as those promulgated in the last 90 days of a presidential term. It is directed at
51 addressing midnight rulemaking of “significant” legislative rules,⁴ although the considerations
52 that underlie it may apply to other agency regulatory activities that affect the public.

RECOMMENDATION

53 **Recommendations to Incumbent Presidential Administrations**

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

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

⁴ 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.” See 58 FR 51735 (Oct. 4, 1993).



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60 3. When incumbent administrations issue a significant “midnight” rule—meaning one
61 issued in the last 90 days of a presidential term— they should explain the timing of the rule in
62 the preamble of the final rule (and, if feasible, in the preamble of the proposed rule).

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

68 5. Post-election, incumbent administrations should share appropriate information about
69 pending rulemaking actions and new regulatory initiatives with incoming administrations.

70 **Recommendations to Incoming Presidential Administrations**

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

80 7. Where the imminence of the effective date of a midnight rule precludes full adherence
81 to the process described in paragraph six, the incoming administration should consider
82 suspending the effective date of the rule for up to 60 days to facilitate its review, if such a



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83 suspension is permitted by law.⁵ Before deciding whether to enter such a suspension order,
84 however, the administration should, where feasible, allow at least a short comment period
85 regarding the desirability of such a suspension. If the administration cannot provide a pre-
86 suspension comment period, it should instead offer the public a subsequent opportunity to
87 comment on whether the suspension should be continued and whether the rule itself should be
88 amended or rescinded.

89 **Recommendation to Congress**

90 8. In order to facilitate incoming administrations' review of midnight rules that would not
91 otherwise qualify for one of the APA exceptions to notice and comment, Congress should
92 consider authorizing agencies to suspend for up to 60 days, without notice and comment, the
93 effective dates of published rules that have not yet gone into effect but would take effect
94 within the first 30 days of a new administration.

95 **Recommendation to the Office of the Federal Register**

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

⁵ The Conference takes no position on whether—absent legislation such as paragraph eight recommends—the law authorizes administrations to suspend the effective dates of rules not yet effective without notice and comment, but recognizes that prior administrations have done so.