Committee on Adjudication

Proposed Recommendation | Midnight Rules

There has been a documented increase in the volume of regulatory activity during the last months of presidential administrations when a President has either been defeated for reelection or is coming to the end of the second term in office. [1] This includes an increase in the number of legislative rules (normally issued under the Administrative Procedure Act's ("APA") notice and comment procedures) and non-legislative rules (such as interpretive rules, policy statements and guidance documents) issued as compared to other periods. These "midnight rules" are promulgated in the last 90 days of an administration, during the "midnight period" as defined in this Recommendation. This late-term regulatory activity has been criticized by politicians, academics, and the media during the last several presidential transitions.

Although part of the increase in Midnight Regulation likely results from ordinary procrastination and external delays, or simply a desire to complete projects before departing, 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 outgoing President's term in order to minimize political

[1] One study shows that, as measured by Federal Register pages (admittedly, a rather crude measure), rulemaking activity increases by an average of 27.4 percent. *See* Jack M. Beermann, Presidential Power in Transitions, 83 B.U.L. Rev. 947, 954, n.12 (2003) (citing Jay Cochran III, The Cinderella Constraint: Why Regulations Increase Significantly During Post-Election Quarters (Mercatus Ctr. at George Mason Univ., Working Paper, 2001), *available at http://www.mercatus.org/PublicationDetails.aspx? id=17546* (studying the number of pages published in the Federal Register over specific time periods in various presidential administrations)).

accountability and to maximize influence beyond the outgoing administration's term. Such strategic timing is said to weaken the check that the political process otherwise provides upon regulatory activity. Second, there is some concern about the quality of rules that have been rushed through the rulemaking process without careful consideration. Third, some fear that midnight rulemaking forces incoming administrations to expend substantial time, energy, and political capital to reexamine the rules and remedy perceived problems with them.

Given this criticism, there have been many proposals for reform of midnight rulemaking, some directed at limiting the ability of outgoing administrations to engage in it and others directed at enhancing the ability of incoming administrations to revise or rescind them. The Conference has found that a dispassionate look at midnight rules reveals that most were under consideration long before the November election and many were relatively routine matters not implicating new policy initiatives by outgoing administrations.[2] The Conference's study found that while there are isolated cases of midnight rules that may have been timed to avoid accountability or that represent efforts to extend the outgoing administration's policies into the future, the majority of them appear to be the result of finishing tasks that were inevitably delayed or derailed by the transition in presidencies. Accordingly, the unseemly perception of midnight rulemaking may be worse than the reality. Nonetheless, midnight rulemaking can put

[2] *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.

a new administration in the awkward position of reviewing a substantial corpus of rules and other actions to ensure quality and consistency with its policies.

While it may be desirable to defer significant and especially controversial rulemakings until after the transition of a presidential administration, shutting the rulemaking process down during the transition period would be impractical given that numerous agency programs engage in constant regulatory activity, often with congressional deadlines.

The Conference believes that reforms aimed at curtailing midnight regulations should be aimed as precisely as possible at the activities that raises the greatest causes for concern. Reforms should target the problems of quality and perceived political illegitimacy that arise from rules that are rushed through the regulatory process or that are initiated late in the outgoing administration's term.

This Recommendation proposes reforms aimed at addressing midnight rulemaking that focus on curbing problematic rulemaking by outgoing administrations and enhancing the powers of incoming administrations to review midnight rules.

RECOMMENDATION

Recommendations to Outgoing Presidential Administrations:

1. Outgoing administrations should manage a transition in a way that ensures that all rules receive adequate consideration at all steps of the rulemaking process. Accordingly, substantial *new* initiatives late in an outgoing administration's term should be avoided whenever possible.

2. Outgoing administrations should consider adopting deadlines to require or encourage agencies to put all rulemaking proposals out for public comment well before the date of the upcoming presidential election and to finish all rulemaking before the election.

3. When an outgoing administration issues a significant or controversial rule during the midnight period, it should publicly explain the timing of the rule in the preamble of the final rule (and if feasible the preamble of the proposed rule). The explanation should include statements as to why the rule was proposed and issued so late in the term and why it was better to take this action rather than leave it for the incoming administration.

4. The Recommendation in paragraph 3 should also apply to significant or controversial non-legislative rules, such as interpretative rules, general statements of policy, or guidance documents.

5. Outgoing 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 an outgoing administration 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.

6. Post-election, outgoing administrations might propose that rulemaking be undertaken in collaboration with incoming administrations.

Recommendations to Incoming Presidential Administrations:

7. An incoming administration that wishes to review some or all midnight rules should solicit public comments on whether the rules under review should be amended, rescinded, or retained. In such cases, the incoming administration should be allowed to rely on the original rulemaking record as well as any new comments received to support its ultimate decision of whether to retain, rescind, or amend a midnight rule.

8. Incoming administrations should publish the results of their review of midnight rules as soon as a final decision is made to either retain the rule or propose amendments or rescission.

Recommendation to Congress:

9. Congress should authorize incoming administrations to briefly suspend the effective dates of published rules for up to 60 days to provide the incoming administration an opportunity to review the rules. Such authorization should provide that:

   a. Unless otherwise specified by law, notice and comment should be employed before the suspension whenever possible even if the public comment period needs to be shorter than normal.

   b. If prior notice and comment before an effective date is delayed is not possible because the rule's effective date is imminent, incoming administrations should solicit public comments while the rules are under review on whether the rule should be allowed to go into effect immediately and on whether the rule itself should be retained, rescinded, or amended.

In the absence of congressional authorization, agencies should follow these practices to the extent feasible.

Recommendations to Federal Agencies:

10. Where the volume of regulatory activity near the end of an outgoing administration's term becomes overwhelming, agencies should focus on high priority actions and leave lower priority matters to the incoming administration.

11. Absent an emergency, agencies should not initiate any major or potentially controversial rulemakings after or close to the date of a presidential election, unless the agency reasonably believes the incoming administration would not object.

12. The Office of Federal Register should maintain its current practice (whether in midnight periods 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.