



Midnight Rules

Committee on Rulemaking

Proposed Recommendation| June 14-15, 2012

Proposed Amendments

This document displays manager's amendments (with no marginal notes) and additional amendments from Conference members (with the source shown in the margin).

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 rules³ issued by past
10 | administrations of both political parties reveals that most were under active consideration long

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 [Congress has previously suggested midnight rules as a topic suitable for Conference study. See Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, House of Representatives, Interim Report on Administrative Law, Process and Procedure for the 21st Century 71 \(2006\) \(listing among "Areas for Additional Research" the following question: "Should a new President be authorized to stay the effectiveness of 'midnight](#)



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11 before the November election and many were relatively routine matters not implicating new
12 policy initiatives by incumbent administrations.⁴ The Conference's study found that while there
13 are 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~~ tie the
15 hands of an incoming administration,⁵ ~~most the majority~~ of the rules appear to be the result of
16 finishing tasks that ~~have been inevitably delayed or derailed by the transition in~~
17 ~~presidencies~~ were initiated before the Presidential transition period or that are the result of
18 deadlines outside the agency's control (such as year-end statutory or court-ordered deadlines).
19 Accordingly, it appears that the increase in rulemaking at the end of an administration likely
20 results primarily from ~~ordinary procrastination and~~ external delays, the ordinary tendency to
21 work to deadline, or simply a natural desire to complete projects before departing.
22 Nonetheless, the timing of such rulemaking efforts ~~midnight rulemaking~~ can put a new
23 administration in the awkward position of having to review a substantial group number of rules
24 and other actions to ensure quality and consistency with its policies.

25 In addition, critics have suggested that administrations have used the midnight period
26 for strategic purposes. First, administrations are said to have reserved particularly controversial
27 rulemakings for the final months of an incumbent President's term in order to minimize
28 political accountability and maximize influence beyond the incumbent administration's term.
29 Such strategic timing is said to weaken the check that the political process otherwise provides

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.").

⁴ See Jack M. Beermann, *Midnight Rules: A Reform Agenda* (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>.

⁵ See, e.g., *Report, supra note 4*, at 23 nn. 56-57, 28 n. 74, -54 n. 137 (~~providing~~ citing an examples of a cases where an incumbent administration may have timed a midnight rule to tie the hands of an incoming administration or considered doing so and where an incumbent administration may have timed a midnight rule to avoid accountability ~~was timed to tie the hands of an incoming administration~~).



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30 on regulatory activity. Second, there is some concern about the quality of rules that may have
31 | been rushed through the rulemaking process ~~without careful consideration~~. Third, some fear
32 | that midnight rulemaking forces incoming administrations to expend substantial time, energy,
33 | and political capital to reexamine the rules and ~~remedy address~~ perceived problems with them.
34 Although similar concerns have been raised with respect to non-legislative rules issued during
35 the midnight period, such rules are not the focus of this Recommendation because they can be
36 | modified or amended without ~~the delaying effect of~~ notice and comment procedures.

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

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

51 Accordingly, this Recommendation proposes reforms aimed at addressing problematic
52 | midnight rulemaking ~~practices that focus on curbing problematic rulemaking~~ by incumbent
53 | administrations and enhancing the ability of incoming administrations to review midnight rules.
54 | ~~This Recommendation~~ defines "midnight rules" as those promulgated in the last 90 days of a
55 | presidential term by an outgoing administration after the Presidential election. It is directed at

Comment [CMA1]: Carol Ann Siciliano
Proposed Amendment 1



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56 addressing midnight rulemaking of “significant” legislative rules,⁶ although the considerations
57 that underlie it may apply to other agency regulatory activities that affect the public.

RECOMMENDATION

58 **Recommendations to Incumbent Presidential Administrations**

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

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

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

Comment [CMA2]: Carol Ann Siciliano
Proposed Amendment 1

72 4. Incumbent administrations should refrain from issuing midnight rules that address
73 internal government operations, such as consultation requirements and funding restrictions,

Comment [CMA3]: Carol Ann Siciliano
Proposed Amendment 2

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.” See 58 FR 51735 (Oct. 4, 1993).



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74 unless there is a pressing need to act before the transition. While incumbent administrations
75 can suggest such changes to the incoming administration, it is more appropriate to leave the
76 final decision to those who would operate under the new requirements or restrictions.

77 5. ~~Post-After the election, i~~ncumbent administrations should continue the practice of
78 shareing appropriate information about pending rulemaking actions and new regulatory
79 initiatives with incoming administrations.

80 **Recommendations to Incoming Presidential Administrations**

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

92 7. ~~Where~~-When the imminence of the effective date of a midnight rule precludes full
93 adherence to the process described in paragraph six, the incoming administration should
94 consider ~~suspending~~-delaying the effective date of the rule, ~~without notice and comment if~~
95 ~~necessary~~, for up to 60 days to facilitate its review, if such an ~~n action suspension~~ is permitted by
96 law.⁷ Before deciding whether to delay the effective date~~enter such a suspension order~~,

⁷ The Conference takes no position on whether—absent legislation such as paragraph eight ~~recommends~~suggests—the law authorizes administrations to ~~suspend~~-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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97 however, the administration should, where feasible, allow at least a short comment period
98 regarding the desirability of ~~such a suspension~~delaying the effective date. If the administration
99 cannot provide a ~~pre-suspension~~ comment period before delaying the effective date of the rule,
100 it should instead offer the public a subsequent opportunity to comment on when, if ever, the
101 rule should take effect~~whether the suspension should be continued~~ and whether the rule itself
102 should be amended or rescinded.

103 **Recommendation to Congress**

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

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

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