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Committee on Rulemaking

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Proposed Recommendation | Midnight Rules

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There has been a documented increase in the volume of regulatory activity during the

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last months of presidential administrations when a President has either been defeated for

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reelection or is coming to the end of the second term in office.¹ This includes an increase in the

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number of legislative rules (normally issued under the Administrative Procedure Act's ("APA")

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notice and comment procedures)² and non-legislative rules (such as interpretive rules, policy

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statements and guidance documents) issued as compared to other periods. These "midnight

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rules" are promulgated in the last 90 days of an administration, during the "midnight period" as

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defined in this Recommendation. This late-term regulatory activity has been criticized by

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politicians, academics, and the media during the last several presidential transitions.

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Although part of the increase in Midnight Regulation likely results from ordinary

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procrastination and external delays, or simply a desire to complete projects before departing,

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critics have suggested that administrations have used the midnight period for strategic

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purposes. First, administrations are said to have reserved particularly controversial rulemakings

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)).

² *See* 5 U.S.C. § 553.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

DRAFT: FOR COMMITTEE REVIEW

3-13-12

17 for the final months of an incumbent President's term in order to minimize political
18 accountability and to maximize influence beyond the incumbent administration's term. Such
19 strategic timing is said to weaken the check that the political process otherwise provides upon
20 regulatory activity. Second, there is some concern about the quality of rules that have been
21 rushed through the rulemaking process without careful consideration. Third, some fear that
22 midnight rulemaking forces incoming administrations to expend substantial time, energy, and
23 political capital to reexamine the rules and remedy perceived problems with them.³

24 Given this criticism, there have been many proposals for reform of midnight rulemaking,
25 some directed at limiting the ability of incumbent administrations to engage in it, some directed
26 at enhancing the ability of incoming administrations to revise or rescind them, and others
27 directed at encouraging incumbent and incoming administrations to collaborate and share
28 information during the rulemaking process. The Conference has found that a dispassionate look
29 at midnight rules reveals that most were under consideration long before the November
30 election and many were relatively routine matters not implicating new policy initiatives by
31 incumbent administrations.⁴ The Conference's study found that while there are isolated cases
32 of midnight rules that may have been timed to avoid accountability or that represent efforts to
33 extend the incumbent administration's policies into the future, most of them appear to be the

³ 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 easily modified or amended.

⁴ 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>.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

DRAFT: FOR COMMITTEE REVIEW

3-13-12

34 result of finishing tasks that would have been inevitably delayed or derailed by the transition in
35 presidencies. Accordingly, the unseemly perception of midnight rulemaking is likely worse than
36 the reality. Nonetheless, midnight rulemaking can put a new administration in the awkward
37 position of reviewing a substantial group of rules and other actions to ensure quality and
38 consistency with its policies.

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

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

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



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

DRAFT: FOR COMMITTEE REVIEW

3-13-12

51 It is directed at addressing midnight rulemaking of “significant” legislative rules
52 (normally issued under the APA’s notice and comment procedures).⁵ Agencies may also use
53 their discretion to apply this Recommendation to non-legislative rules (such as interpretive
54 rules, policy statements, and guidance documents).

RECOMMENDATION

56 **Recommendations to Incumbent Presidential Administrations:**

57 1. Each incumbent administration should manage each step of the rulemaking process
58 throughout its term in a way that avoids an actual or perceived rush of the final stages of the
59 process. Accordingly, the introduction of *new* significant regulatory initiatives late in an
60 incumbent administration’s term should be avoided whenever possible.

- 61 a. Where the volume of regulatory activity near the end of an incumbent
62 administration’s term becomes overwhelming, agencies should focus on high
63 priority actions and leave lower priority matters to the incoming administration.
- 64 b. Absent an emergency, agencies should not initiate any *new* significant
65 rulemakings after or close to the date of a presidential election, unless the
66 agency reasonably believes that the incoming administration would not object.

⁵ Executive Order 12866 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 Fed. Reg. 51735 (Oct. 4, 1993).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

DRAFT: FOR COMMITTEE REVIEW

3-13-12

67 2. Incumbent administrations should consider encouraging agencies to put significant
68 rulemaking proposals out for public comment well before the date of the upcoming presidential
69 election and to complete rulemakings before the election when possible.

70 3. When an incumbent administration issues a significant rule during the midnight period,
71 it should publicly explain the timing of the rule in the preamble of the final rule (and if feasible
72 the preamble of the proposed rule).⁶ The explanation should include statements as to why the
73 rule was issued so late in the term.

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

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

81 **Recommendations to Incoming Presidential Administrations:**

82 6. An incoming administration that wishes to review some or all midnight rules that have
83 already gone into effect should solicit public comment on whether the rules under review
84 should be amended, rescinded, or retained. In such cases, and whenever possible, the
85 incoming administration should rely on the original rulemaking record as well as any new

⁶ In this Recommendation, the term “midnight period” refers to the last 90 days of a presidential administration.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

DRAFT: FOR COMMITTEE REVIEW

3-13-12

86 comments received to support its ultimate decision of whether to retain, rescind, or amend a
87 midnight rule.

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

90 **Recommendation to Congress:**

91 8. Congress should authorize incoming administrations to briefly suspend the effective
92 dates of published rules that have not yet gone into effect for up to 60 days in order to provide
93 the incoming administration an opportunity to review the rules. Such authorization should
94 provide that:

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

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

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

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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

DRAFT: FOR COMMITTEE REVIEW

3-13-12

106 **Recommendation to the Office of Federal Register:**

107 9. The Office of Federal Register should maintain its current practice (whether in midnight
108 periods or not) of allowing withdrawal of rules before filing for public inspection and not
109 allowing rules to be withdrawn once they have been filed for public inspection or published
110 absent exceptional circumstances.