



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

| DRAFT: FOR COMMITTEE REVIEW

[2-173-13-12](#)

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2 Committee on Rulemaking

3 Proposed Recommendation | Midnight Rules

4 There has been a documented increase in the volume of regulatory activity during the
5 last months of presidential administrations when a President has either been defeated for
6 reelection or is coming to the end of the second term in office.¹ This includes an increase in the
7 number of legislative rules (normally issued under the Administrative Procedure Act's ("APA")
8 notice and comment procedures)² and non-legislative rules (such as interpretive rules, policy
9 statements and guidance documents) issued as compared to other periods. These "midnight
10 rules" are promulgated in the last 90 days of an administration, during the "midnight period" as
11 defined in this Recommendation. This late-term regulatory activity has been criticized by
12 politicians, academics, and the media during the last several presidential transitions.

13 Although part of the increase in Midnight Regulation likely results from ordinary
14 procrastination and external delays, or simply a desire to complete projects before departing,
15 critics have suggested that administrations have used the midnight period for strategic
16 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.



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

24 ³

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

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>.



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34 accountability or that represent efforts to extend the ~~outgoing~~incumbent administration's
35 policies into the future, ~~the majority~~most of them appear to be the result of finishing tasks that
36 ~~were~~would have been inevitably delayed or derailed by the transition in presidencies.
37 Accordingly, the unseemly perception of midnight rulemaking ~~may be~~is likely worse than the
38 reality. Nonetheless, midnight rulemaking can put a new administration in the awkward
39 position of reviewing a substantial ~~corpus~~group of rules and other actions to ensure quality and
40 consistency with its policies.

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

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

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



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

RECOMMENDATION

58 **Recommendations to OutgoingIncumbent Presidential Administrations:**

59 1. Outgoing administrationsEach incumbent administration should manage a transition in
60 a way that ensures that all rules receive adequate consideration at all stepseach step of the
61 rulemaking process throughout its term in a way that avoids an actual or perceived rush of the
62 final stages of the process. Accordingly, substantialthe introduction ofnew significant
63 regulatory initiatives late in an outgoingincumbent administration’s term should be avoided
64 whenever possible.

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65 a. Where the volume of regulatory activity near the end of an incumbent
66 administration’s term becomes overwhelming, agencies should focus on high
67 priority actions and leave lower priority matters to the incoming administration.

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).



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- 68 b. Absent an emergency, agencies should not initiate any new significant
69 rulemakings after or close to the date of a presidential election, unless the
70 agency reasonably believes that the incoming administration would not object.
- 71 2. Outgoing~~Incumbent~~ administrations should consider ~~adopting deadlines to require or~~
72 encourage~~encouraging~~ agencies to put ~~all~~significant rulemaking proposals out for public
73 comment well before the date of the upcoming presidential election and to ~~finish all~~
74 rulemaking~~complete rulemakings~~ before the election when possible.
- 75 3. When an outgoing~~incumbent~~ administration issues a significant~~-or controversial~~ rule
76 during the midnight period, it should publicly explain the timing of the rule in the preamble of
77 the final rule (and if feasible the preamble of the proposed rule).⁶ The explanation should
78 include statements as to why the rule was ~~proposed and~~ issued so late in the term~~and why it~~
79 was better to take this action rather than leave it for the incoming administration.
- 80 4. The Recommendation in paragraph 3 should also apply to significant or controversial
81 non-legislative rules, such as interpretative rules, general statements of policy, or guidance
82 documents.
- 83 5. Outgoing~~4. Incumbent~~ administrations should refrain from issuing midnight rules
84 that address internal government operations, such as consultation requirements and funding
85 restrictions, unless there is a pressing need to act before the transition. While an
86 outgoing~~incumbent~~ administration can suggest such changes to the incoming administration, it

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



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87 is more appropriate to leave the final decision to those who would operate under the new
88 requirements or restrictions.

89 65. Post-election, outgoingincumbent administrations might propose that should share
90 appropriate information about pending rulemaking be undertaken in collaboration actions and
91 new regulatory initiatives with incoming administrations.

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94 **Recommendations to Incoming Presidential Administrations:**

95 7. 6. An incoming administration that wishes to review some or all midnight rules that
96 have already gone into effect should solicit public commentscomment on whether the rules
97 under review should be amended, rescinded, or retained. In such cases, and whenever
98 possible, the incoming administration should be allowed to rely on the original rulemaking
99 record as well as any new comments received to support its ultimate decision of whether to
100 retain, rescind, or amend a midnight rule.

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

103 **Recommendation to Congress:**

104 98. Congress should authorize incoming administrations to briefly suspend the effective
105 dates of published rules that have not yet gone into effect for up to 60 days in order to provide



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106 the incoming administration an opportunity to review the rules. Such authorization should

107 provide that:

108 a. Unless otherwise specified by law, notice and comment should be employed

109 before the suspension whenever possible even if the public comment period

110 needs to be shorter than normal.

111 b. If prior notice and comment before an effective date is delayed is not possible

112 because the rule's effective date is imminent, incoming administrations should

113 solicit public comments while the rules are under review on whether the rule

114 should be allowed to go into effect immediately and on whether the rule itself

115 should be retained, rescinded, or amended.

116 In the absence of congressional authorization, agencies should follow these practices to the

117 extent feasible.

Recommendations

Recommendation to the Office of Federal Agencies Register:

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

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



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- 126 | [129.](#) The Office of Federal Register should maintain its current practice (whether in midnight
127 periods or not) of allowing withdrawal of rules before filing for public inspection and not
128 allowing rules to be withdrawn once they have been filed for public inspection or published
129 absent exceptional circumstances.