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Committee on Rulemaking

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)).



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18 accountability and to maximize influence beyond the outgoing 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.

24 Given this criticism, there have been many proposals for reform of midnight rulemaking,
25 some directed at limiting the ability of outgoing administrations to engage in it and others
26 directed at enhancing the ability of incoming administrations to revise or rescind them. The
27 Conference has found that a dispassionate look at midnight rules reveals that most were under
28 consideration long before the November election and many were relatively routine matters not
29 implicating new policy initiatives by outgoing administrations.² The Conference's study found
30 that while there are isolated cases of midnight rules that may have been timed to avoid
31 accountability or that represent efforts to extend the outgoing administration's policies into the
32 future, the majority of them appear to be the result of finishing tasks that were inevitably
33 delayed or derailed by the transition in presidencies. Accordingly, the unseemly perception of
34 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>.



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

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

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

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

49 **RECOMMENDATION**

50 **Recommendations to Outgoing Presidential Administrations:**

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



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

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

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

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

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

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74 **Recommendations to Incoming Presidential Administrations:**

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

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

82 **Recommendation to Congress:**

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

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

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



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

96 **Recommendations to Federal Agencies:**

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

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

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