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Presidential Transitions: Midnight Rulemaking

Midnight Rulemaking Overview

During the final months of presidential Administrations, federal agencies have often increased the pace of their regulatory activities. This phenomenon is often referred to as “midnight rulemaking.” Because it can be a challenge to change or eliminate rules after they have been finalized, issuing midnight rules can help ensure a legacy for an outgoing President—especially when an incoming Administration is of a different party.

Some concerns that have been raised over midnight rulemaking include the decreased political accountability for an outgoing Administration, the potential for rules that are hurried through at the end of an Administration not to have the same opportunity for public input, and the potential for the quality of regulations to suffer during the midnight period because the departing Administration may issue rules quickly and without subjecting them to rigorous review or analysis. In addition, some have argued that evaluating a previous Administration’s midnight rules can potentially overwhelm a new Administration.

On the other hand, one study from 2012 concluded that “the perception of midnight rulemaking as an unseemly practice is worse than the reality.” The Administrative Conference of the United States issued a number of recommendations regarding midnight rulemaking in 2012, concluding after a study that many midnight rules were “relatively routine matters not implicating new policy initiatives by incumbent administrations” and that the “majority of the rules appear to be the result of finishing tasks that were initiated before the presidential transition period or the result of deadlines outside the agency’s control.”

Options for a New Administration: Changing or Repealing Midnight Rules

A new Administration has various options for reviewing, amending, or repealing midnight regulations. New Administrations have often revisited policies established under prior Administrations, and they have fairly wide authority to do so—provided the new policies are consistent with procedural and other legal requirements.

The options available to a new Administration for responding to midnight rules depend on the status of each rule at the time the new President takes office.

Amending or Repealing Finalized Rules

To change or repeal rules that were finalized by a previous Administration, federal agencies are generally subject to a well-established set of procedural requirements. A regulation is considered finalized if it was published in the *Federal Register* as a final rule or, pursuant to a 2022 ruling from the U.S. Court of Appeals for the D.C. Circuit, placed

on public inspection ahead of being published in the *Federal Register*.

Rulemaking requirements derive primarily from the Administrative Procedure Act (APA; 5 U.S.C. §551 et seq.), as well as other statutes and executive orders. Section 553 of the APA generally requires agencies to (1) publish a notice of proposed rulemaking (also commonly referred to as a proposed rule) in the *Federal Register*; (2) allow interested persons an opportunity to comment on the proposed rule; and (3) after reading and considering those comments, publish the final rule in the *Federal Register*. Furthermore, in most cases, the final rule may not become effective until at least 30 days after its publication.

Most agencies are also subject to Executive Order 12866, which requires review of “significant” proposed and final rules by the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB). For a subset of those rules, an agency must also conduct a regulatory impact analysis when a rule is expected to have a particularly large economic effect. In conducting such analysis, agencies are generally required to follow the guidance of OMB Circular A-4.

Other applicable statutes and executive orders, such as the Regulatory Flexibility Act (5 U.S.C. §§601-612), may also require agencies to conduct analyses or take additional procedural steps at various points in the rulemaking process. Congress has also sometimes enacted rule- or program-specific procedural requirements, which would further supplement any general rulemaking requirements.

Under the APA, *rulemaking* is defined as “formulating, amending, or repealing a rule,” meaning an agency must follow the rulemaking procedures set forth by the APA and other statutory and executive order requirements to change or repeal a rule, not just to issue a new rule.

Halting or Repealing Not-Yet-Finalized Rules: Regulatory Moratoria and Postponements

While a rulemaking process is generally required to overturn midnight rules that have been finalized by the time a new President is sworn in, new Presidents typically have more authority over rules that have not yet been finalized. If a rule has not yet been finalized, a new Administration may be able, immediately upon taking office, to prevent the rule from being issued.

One approach Presidents have used has been to impose a moratorium on regulations under development—that is, those that have not yet been published as final rules in the *Federal Register*. Such moratoria have essentially put a halt to rulemaking activities within federal agencies to allow the

new Administration to take stock and decide which regulations to allow to move forward and which to abandon. In addition, these moratoria have generally instructed agencies to briefly postpone or consider postponing the effective dates of rules that were issued at the end of the previous President's term but had not yet taken effect—although changing the effective date of a rule is generally itself considered an amendment to a rule that would be subject to the APA and other rulemaking requirements. Past regulatory moratoria have typically stated that they would not apply to rules that are required under statute or by a judicial decision, nor have they applied to rules at independent regulatory agencies, which are more independent from presidential control.

Moratoria have been issued in the first days of all recent Administrations when the incoming President was of a different party from the outgoing President—including the Reagan, Clinton, George W. Bush, Obama, Trump, and Biden Administrations.

Amending or Repealing Guidance Documents

Agencies frequently issue guidance documents to explain their interpretations of underlying statutes and regulations and to notify regulated entities and the public about their intentions for carrying out their congressionally delegated authority. Guidance documents include a wide range of agency actions, most notably interpretive rules, which explain or clarify preexisting legal obligations without themselves imposing new obligations or prohibitions, and policy statements, which describe how an agency will exercise its authority to implement law or policy.

Compared to the processes generally required to repeal previously issued regulations, a new Administration's ability to rescind guidance documents is typically more straightforward. Unless otherwise legally required by a specific statutory provision, an agency does not have to use notice-and-comment procedures to rescind a previously issued guidance document. Guidance documents are not subject to rulemaking or other procedural requirements.

Options for Congress

Under the constitutional separation-of-powers system, agencies issue regulations pursuant to statutory authority that has been delegated to them by Congress. This allows Congress to retain general control over agencies through a variety of means, including general legislative power over agencies' rulemaking authority and individual regulations. Agencies are bound first and foremost by whatever Congress has established or required in statute—meaning that if Congress were to instruct an agency to repeal a regulation issued under the prior Administration, the agency would be required to do so.

General Legislative Powers

Congress's general legislative power over regulations is broad: Congress can overturn or amend regulations that have already been issued by an agency, prevent an agency from finalizing rules under development—including those it has already issued as proposed rules—or amend or repeal the statutory authority underlying a regulation. Such an amendment could instruct an agency to amend a rule by

making specified changes or to repeal a previously issued version of the rule.

Congressional Review Act

Congress may also use the Congressional Review Act (CRA; 5 U.S.C. §§801-808) to disapprove final rules. The CRA contains fast-track procedures—particularly in the Senate—for considering a joint resolution of disapproval to overturn a rule. If both houses of Congress pass a joint resolution of disapproval, it is sent to the President for signature. If the President signs the joint resolution of disapproval, the rule cannot take effect and will be treated as though it had never been in effect, and the issuing agency is prohibited from issuing a rule that is “substantially the same” as the nullified rule. The CRA can be used only on rules that have been finalized, and each joint resolution of disapproval is aimed at one single rule in its entirety. The CRA applies to a wide swath of agency actions, including some guidance documents issued outside of the APA's notice-and-comment rulemaking process.

The primary advantage of using the CRA to overturn rules is that its fast-track procedures, particularly in the Senate, make it easier to pass a joint resolution of disapproval than to pass a regular bill.

The CRA's fast-track procedures are available for a limited time after a rule is finalized and submitted to Congress. The CRA also contains a provision—sometimes referred to as the lookback provision—that allows a new President and Congress to overturn midnight rules issued in the last several months of the previous Administration. The Senate and House Parliamentarians are the arbiters of precise timing of the CRA's disapproval mechanism.

Appropriations Limitations

Another option available to Congress to respond to midnight rules is to use so-called limitation provisions in appropriations measures to prohibit agencies from using appropriated funds for certain rulemaking-related purposes, including finalizing, implementing, or enforcing rules. Provisions of this type do not repeal or change existing regulations, nor do they remove agencies' underlying statutory authority to issue regulations. Therefore, any final rule that has taken effect will continue to be effective—even if an appropriations restriction prohibits the agency from using funds to enforce the rule—making the practical status of the rule less clear. In addition, restrictions on the use of funds in appropriations acts, unless otherwise specified, are binding only for the period of time covered by the measure (i.e., a fiscal year or a portion of a fiscal year).

For additional discussion of some of the legal issues identified in this In Focus, see CRS Legal Sidebar LSB10566, *Responses to Midnight Rulemaking: Legal Issues*.

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