

Presidential Transitions: Midnight Rulemaking

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In Section 2 of the Presidential Transition Act of 1963 (as amended; 3 U.S.C. 102 note), Congress declared that “[t]he national interest requires that [presidential] transitions ... be accomplished so as to assure continuity in the faithful execution of the laws and in the conduct of the affairs of the Federal Government, both foreign and domestic.” The crux of such a transition is the transfer of executive power from the incumbent to the President-elect. The executive’s power manifests in a variety of processes with application to a broad range of policy areas and issues. CRS has produced a set of products examining selected processes and policies that may be of particular interest during a presidential transition. This Insight discusses options available to a new Administration for repealing or amending *midnight rules* issued by the prior Administration. Other related products examine clemency, executive orders, presidential and government records, presidential appointments (executive branch), and presidential transitions generally.

Midnight Rulemaking Overview

During the final months of recent Administrations, federal agencies [often have increased the pace](#) of their regulatory activities. This phenomenon is often referred to as *midnight rulemaking*. Because it can be difficult 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 the task of evaluating a previous Administration’s midnight rules could potentially overwhelm a new Administration.

By contrast, one [study from 2012 cited](#) evidence of the strategic use of midnight rulemaking but 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

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midnight rulemaking in 2012, concluding 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

A new Administration has various options for reviewing, amending, or repealing midnight regulations. The available options depend on the status of the rule at the time the new Administration takes office. Once a rule has been finalized, a new Administration would be required to undergo a rulemaking process to change or repeal all or part of the rule. If a rule has not yet been finalized, however, a new President may be able, immediately upon taking office, to prevent the rule from being issued.

Changing or Repealing Previously Issued Rules

Under the [Administrative Procedure Act](#) (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. Under the APA, agencies are generally [required](#) to publish a notice of proposed rulemaking in the *Federal Register*, allow “interested persons” an opportunity to comment on the proposed rule, and, after considering those comments, publish the final rule. Furthermore, in most cases, the final rule may not become effective until at least 30 days after its publication.

Regulatory Moratoria and Postponements

Whereas 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. One approach Presidents have used to control rulemaking at the start of their Administrations has been the imposition of a moratorium on regulations under development (i.e., those that have not yet been published as final rules in the *Federal Register*). Such moratoria essentially have halted on rulemaking activities within federal agencies and instructed the agencies to briefly postpone the effective dates of rules that were issued at the end of the previous President’s term. The moratoria generally have not applied 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 halting rules under way at agencies have been issued in the first days of most recent Administrations—including the [Reagan](#), [Clinton](#), [Bush](#), [Obama](#), and [Trump](#) Administrations. Summaries of most of these moratoria can be found in CRS Report R42612, *Midnight Rulemaking: Background and Options for Congress*.

Options for Congress

Although actions pertaining to midnight rules often happen within the Administration, Congress also has options for overturning or amending midnight rules. First, Congress can use its general legislative power to overturn or amend regulations that already have been issued by an agency, prevent an agency from finalizing rules it has already proposed or that are currently under development, or amend the statutory authority underlying a regulation(s).

Congress also may use the [Congressional Review Act \(CRA\)](#) to disapprove final rules. The CRA contains “fast-track” procedures for considering a joint resolution disapproving a rule. Notably, the CRA contains a

provision—sometimes referred to as the *lookback mechanism*—that allows a new President and Congress to overturn midnight rules issued in the last several months of the outgoing Administration.

Alternatively, Congress can include 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.

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