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Legal Sidebar

Responses to Midnight Rulemaking: Legal Issues

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Federal agencies often increase rulemaking activity during the final months of a presidential administration—a phenomenon commonly known as "midnight rulemaking." For example, since Election Day, November 5, 2024, agencies in the Biden Administration have issued dozens of "significant" final rules governing issues ranging from Supplemental Nutrition Assistance Program (SNAP) work requirements to the regulation of trichloroethylene under the Toxic Substances Control Act. Federal agencies also published a number of proposed rules that have not yet been finalized.

Critics have objected to the midnight rulemaking phenomenon on a variety of grounds, but condemnation of the practice is not universal. Objections have been based on, among other things, the belief "that the outgoing administration is illegitimately attempting to project its agenda beyond its constitutionally prescribed term," that rules "rushed" through the administrative process may suffer in quality, and that incoming presidential administrations must spend an otherwise unnecessarily significant amount of time and resources upon entering office in reviewing and potentially responding to the prior administration's midnight activity. Notably, however, a 2012 report commissioned by the Administrative Conference of the United States found that "the overwhelming majority" of rulemaking that occurs during an administration's final months "appears to be the result of simple hurrying to finish tasks that would inevitably be delayed or derailed by the transition in presidencies." The report acknowledged, however, that the practice "puts the new administration in the awkward position of finding it necessary to review a substantial corpus of rules and other actions to ensure quality and consistency with the new administration's policies."

Since President Reagan took office in 1981, incoming presidential administrations have routinely taken measures to respond to a prior administration's midnight rulemaking activities. This Sidebar explains how the incoming Trump Administration may confront the last-minute rules finalized or proposed in the waning days of the Biden Administration—including rescinding rules that have already taken effect and suspending the effective dates of rules that were finalized by the prior Administration but which have not yet become legally effective—and how courts generally have responded to challenges to an agency's rescission or postponement of a final rule. This Sidebar also addresses actions Congress could take to rescind or prevent the implementation or enforcement of midnight rules with which it disagrees.

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Incoming Presidential Responses to Midnight Rulemaking

New presidential administrations have deployed several strategies for the stated purpose of giving agencies an opportunity to review new or pending rules. These include directing agencies to

> (1) refrain from sending any proposed or final rules to the Office of the Federal Register (OFR) for publication in the *Federal Register*;
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> (2) withdraw from OFR any proposed or final rules that have not yet been published in the *Federal Register*; and
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> (3) postpone or consider postponing for 60 days the effective dates of rules that have been published in the *Federal Register* but that have not yet taken effect.

Such directives often exempt rulemakings responding to emergencies "or other urgent circumstances" (such as those concerning health or safety), as well as rulemakings subject to deadlines imposed by statute or court order.

Consistent with the practice of previous administrations, the incoming Trump Administration may issue similar directives upon President-elect Trump's inauguration. Looking to the first Trump Administration's practice may shed light on how the incoming Administration may respond to the Biden Administration's midnight rules. At the start of President Trump's first term—on his first day in office—the President's Chief of Staff issued a memorandum to executive departments and agencies outlining the President's "plan for managing the Federal regulatory process at the outset of his Administration." The memorandum directed agencies to take the types of actions described above with regard to the Obama Administration's midnight rulemakings. With respect to rules that had been published or issued but had not yet taken effect, the memorandum directed agencies to "temporarily postpone" the rules' effective dates for 60 days "for the purpose of reviewing questions of fact, law, and policy they raise." The memorandum further directed agencies "to consider proposing for notice and comment a rule to delay the effective date for regulations beyond that 60-day period."

The first Trump Administration's memorandum applied not only to "rules" and "regulatory actions" but also to guidance documents, which are defined as "any agency statement of general applicability and future effect that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue." The Biden Administration similarly directed agencies to apply its midnight rulemaking directives to guidance documents issued during the waning days of the first Trump Administration.

In addition to these directives, incoming administrations often issue other directives concerning agency rulemaking. For example, President Trump issued an executive order in the opening days of his first Administration providing that, "for every one new regulation issued" by an agency, the agency should identify "at least two prior regulations . . . for elimination." As another example, one executive order from the early days of the Biden Administration, titled "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," directed agencies to review all actions taken at any time by the Trump Administration that "are or may be inconsistent with, or present obstacles to" the new Administration's scientific and environmental policy objectives.

Relevant Legal Principles

Understanding how an incoming administration may address midnight rules requires an understanding of how agencies promulgate such rules in the first instance. Agencies issue rules in many forms, each subject to different requirements. Rules intended to have legal effect typically take the form of "legislative rules," issued pursuant to authority delegated by Congress. To take effect, these rules typically must undergo the "informal rulemaking" process set forth in the Administrative Procedure Act (APA). Agencies engaging in

that process generally must first publish a notice of proposed rulemaking in the *Federal Register* and allow members of the public an opportunity to submit comments on the proposed rule. The final rule generally must be published in the *Federal Register* at least 30 days before the rule becomes effective.

Only a subset of agency rules is required to undergo notice-and-comment rulemaking proceedings under the APA, however. The APA provides various exceptions with respect to the categories of rules that are subject to those procedural requirements. Rules that implicate military or foreign affairs functions; agency management or personnel; or public property, loans, grants, benefits, or contracts are exempt from notice-and-comment requirements and may be effective upon publication. The APA also exempts interpretative rules, general statements of policy, and rules of agency organization, procedure, or practice from the statute's notice-and-comment procedures. An agency also may bypass notice and comment when it "for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." Finally, the APA's requirement that a rule be published in the *Federal Register* at least 30 days before it becomes effective does not apply (1) to "a substantive rule" that removes a restriction or provides an exemption, (2) to interpretive rules or policy statements, or (3) when an agency finds there is "good cause" for the rule to take immediate effect.

A new administration typically may *amend or repeal a rule* the previous administration has issued. The APA includes amendment and repeal in its definition of "rule making," thus requiring that agencies comply with applicable requirements not only when issuing a new legislative rule, but also when altering or rescinding such a rule. Agencies therefore normally must follow notice-and-comment procedures when amending or repealing legislative rules, but not when amending or repealing an interpretive rule, general policy statement, or procedural rule.

A new administration also may take action with respect to midnight rules that have not yet taken effect. First, OFR regulations provide that an agency generally may *withdraw a rule* during the period of time after the agency has transmitted the rule to OFR but before OFR has published the rule—however, the U.S. Court of Appeals for the District of Columbia Circuit has held that an agency must engage in notice and comment to rescind a rule if OFR has already made the rule available for public inspection, which typically occurs one business day prior to publication. An agency also may not withdraw a rule where it has a nondiscretionary legal responsibility to publish the rule in the *Federal Register* (e.g., when required to do so by statute).

Additionally, an agency can *postpone or suspend* the effective date or compliance deadlines of a midnight rule that has already been published but has not yet taken effect. Courts have uniformly held that suspension is normally tantamount to an amendment or repeal of a rule. The APA's procedural requirements for rulemaking, including for notice and comment, apply with equal force to rule suspensions unless an agency can satisfy the APA's "good cause" exception or another relevant exception. Although agencies may postpone the implementation of new rules in order to give a new administration an opportunity to review not-yet-effective regulations issued by the prior administration, the decision to reconsider a rule does not automatically authorize an agency to postpone its implementation indefinitely. Courts have observed that applying the APA's rulemaking requirements to the postponement or suspension of a rule prevents agencies from effectively repealing a final rule by delaying it "while sidestepping the statutorily mandated process for revising or repealing that rule on the merits."

In some instances, agencies implementing an incoming administration's regulatory moratorium have postponed the effective dates of rules without adhering to the notice-and-comment procedures. Notably, in such instances, the postponements generally have been relatively short, and the time required for notice and comment would extend past the rule's revised effective date. For example, in January 2017, the Environmental Protection Agency (EPA) invoked the "good cause" exception to bypass those requirements when it postponed for 60 days the effective dates of 30 rules pursuant to the Trump Administration's directive to postpone temporarily all published regulations that had not yet taken effect. In light of the imminent effective dates of the rules, EPA explained that it would have been impractical

and "contrary to the public interest in the orderly promulgation and implementation of regulations" to seek public comment prior to postponing them.

Finally, pursuant to Section 705 of the APA, an agency may postpone a rule's effective date, without providing notice and an opportunity for public comment, if the rule is pending judicial review and "an agency finds that justice so requires." The purpose of such a postponement is not to amend or repeal a rule but to maintain the status quo while litigation proceeds. While case law on agencies' use of Section 705 is limited, district courts have generally allowed agencies to invoke Section 705 only to postpone rules that are not yet in effect, rather than to delay compliance dates after a rule has taken effect.

Actions to amend, repeal, or postpone published legislative rules are subject to judicial review. The APA directs courts to invalidate rules that are governed by that statute if they, among other things, are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The "arbitrary and capricious" standard requires that an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."

The APA's arbitrary and capricious standard applies both when an agency issues a rule and when it amends or rescinds an earlier rule. The Supreme Court has affirmed that agencies must supply a "reasoned analysis" when changing course. Generally, an agency must explain its departure from its prior regulatory approach, address prior factual findings that contradict those underlying the new policy, and consider "serious reliance interests" that are affected by a change in policy.

In sum, the incoming Trump Administration's ability to review and change course on a rule issued in the waning days of the Biden Administration may depend on the nature of the rule and whether it has been made available for public inspection or taken effect. Agencies have considerable flexibility to withdraw rules before they have been made available for public inspection or briefly to postpone effective dates of published rules. If an agency issued a rule pursuant to the APA's notice-and-comment procedures and the rule has already taken effect, however, the new administration generally must adhere to the same procedural requirements to amend or repeal the rule that the agency followed when it originally promulgated the rule. Additionally, longer postponements may also be subject to the APA's notice-and-comment procedures—and the APA's requirement that rules be published in the *Federal Register* at least 30 days prior to becoming effective—unless an agency can satisfy a relevant exception.

Considerations for Congress

In addition to actions available to administrative agencies to address midnight rules, Congress has a number of options available to it for rescinding or preventing the implementation or enforcement of midnight rules with which it disagrees. Administrative agencies are creatures of statute and only exercise authority that has been delegated to them by Congress. Just as Congress may, by statute, authorize or require an agency to issue rules, it also may directly reject a rule through the normal legislative process. Congress can also require an agency to rescind or alter a rule by amending the underlying statute granting rulemaking authority to the agency. Thus, Congress can by statute overturn a midnight rule.

Congress also, via application of its legislative power, may use the expedited procedures provided by the Congressional Review Act (CRA) to overturn a presidential administration's midnight rule. Under the CRA, an agency must submit a covered rule to Congress before the rule may go into effect and, once submitted, Congress can use special, fast-track procedures to consider a joint resolution of disapproval of the rule. If a joint resolution is enacted, either by presidential signature or congressional override of a presidential veto, the relevant rule "shall not take effect (or continue)." An agency is prohibited from reissuing a rejected rule "in substantially the same form" or from issuing "a new rule that is substantially the same," unless the "rule is specifically authorized" under a subsequently enacted law. Although the CRA generally requires Congress to take action on a rule within a specified amount of time following the rule's submission to Congress, the CRA also provides a "lookback mechanism" to permit a new Congress

to utilize the CRA's procedures on rules submitted in the waning days of a previous Congress. This lookback mechanism enables a new Congress to enact a joint resolution of disapproval to overturn a prior presidential administration's midnight rule in the first months of the new Congress. If the new presidential administration also disfavors the prior administration's rule, Congress may have more success using the CRA to overturn the rule because the new administration would be less likely to veto the joint resolution than the administration that issued the rule. (For an overview of the CRA, including its procedures, see CRS Report R43992, *The Congressional Review Act (CRA): Frequently Asked Questions*, by Maeve P. Carey and Christopher M. Davis [2021].)

Congress can also prevent an agency from implementing or enforcing a midnight rule through exercise of its authority over appropriations. In addition to allocating money for agency operations and activities, Congress also is authorized, as the Supreme Court has recognized, to "circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes." Congress can, therefore, use its power of the purse to prevent operation of a midnight rule.

Similarly, if Congress disagrees with how a new presidential administration addresses a midnight rule issued by the previous administration, Congress may use these same tools to maintain all or portions of the prior administration's rule. Specifically, Congress can enact a statute preventing a change to or recission of a specific rule, utilize the CRA procedures to reject the new administration's changes to a rule, or use the power of the purse to prevent agencies from altering or rescinding a specific rule.

Additionally, Congress may enact legislation to address the general procedures for midnight rulemaking and congressional review of midnight rules. For example, in the 118th Congress, the proposed Midnight Rules Relief Act (H.R. 115 and S. 4485) would have prohibited agencies from proposing or finalizing "significant rules," with limited exceptions, in the period between a presidential election and Inauguration Day in years when there is a lame-duck President. The bill, which the House of Representatives passed, also would have amended the CRA to enable Congress disapprove a group of rules together, as opposed to the current process for considering a single rule at a time. Accordingly, Congress could both curtail the ability of agencies to issue midnight rules and facilitate its own disapproval of such rules through the CRA.

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