

Midnight Rules: Congressional Oversight and Options

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During the final months of recent presidential administrations, federal agencies have typically issued a larger number of rules relative to comparable time periods earlier in the administration. This phenomenon is often referred to as "midnight rulemaking." Various scholars and observers of the federal regulatory process have documented evidence of midnight rulemaking by recent outgoing administrations, and many expect a similar trend to reoccur in the final months of the Obama Administration.

Midnight rulemaking likely occurs because the outgoing presidential administration wants to achieve certain policy goals before the end of its term. Because it can be difficult to change or eliminate rules after they have been finalized, issuing midnight rules can help ensure a legacy for a President—especially when an incoming administration is of a different party. As one George W. Bush Administration official [wrote](#), midnight rulemaking is like "Cinderella leaving the ball. ... [P]residential appointees hurried to issue last-minute 'midnight' regulations before they turned back into ordinary citizens at noon on January 20th."

Some entities and individuals have raised a number of concerns over the practice of midnight rulemaking. One such concern is that an outgoing administration has less political accountability compared to an administration faced with the possibility of reelection. Furthermore, rules that are hurried through at the end of an administration may not have the same opportunity for public input: agencies may find that to issue regulations by the end of an administration, they may not have sufficient time to read and digest public comments received during the comment period.

Another concern over midnight rulemaking is that the quality of regulations may suffer during the midnight period, since the departing administration may issue rules quickly, and, as a result, the rules may not receive adequate review or analysis. One study [suggested that](#) "an increase in the number of regulations promulgated in a given time period could overwhelm the institutional review process that serves to ensure that new regulations have been carefully considered, are based on sound evidence, and can justify their cost." In particular, the concern raised here is that the [Office of Information and Regulatory Affairs](#) (OIRA) in the Office of Management and Budget (OMB) may not have enough staff or resources to conduct full reviews of regulations if they receive a larger number of regulations than usual for review. (See [CRS Report RL32397](#) for an overview of the role of OIRA in federal rulemaking.)

Finally, [some have argued](#) that the task of evaluating a previous administration's midnight rules can potentially overwhelm a new administration.

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On the other hand, the Administrative Conference of the United States (ACUS) issued a number of [recommendations](#) regarding 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 (such as year-end statutory or court-ordered deadlines)." The [study accompanying the ACUS recommendations](#) cited some evidence of the strategic use of midnight rules to implement certain desired policies before leaving office, but, in general, ACUS concluded that "the perception of midnight rulemaking as an unseemly practice is worse than the reality."

Options for Congress

Congress has several options pertaining to midnight rules—even for those that have already taken effect. First, Congress can use its legislative power to overturn or amend a regulation that has already been issued by an agency, prevent an agency from finalizing a rule it has already proposed, or amend the statutory authority underlying a regulation. A change in the underlying statutory authority could force an agency to amend a regulation that has been already issued, or it could provide additional instruction to an agency before the rule has been finalized.

In addition, Congress can use the Congressional Review Act (CRA) to disapprove agency rules once they are finalized. The main advantage of the CRA is that it contains "fast-track" procedures that can make passage of a joint resolution disapproving a rule easier than passing a bill through the regular legislative process. If a CRA disapproval resolution is enacted, the agency is prohibited from issuing a rule that is "substantially the same" as the disapproved rule until Congress provides additional statutory authorization for such a rule. (For more information about the CRA, see [CRS Report R43992](#).)

Notably, the CRA can be used to overturn midnight rules issued by an outgoing President after that President's term has expired and a new President has been sworn in to office. The CRA contains a provision stipulating that if Congress does not receive the full periods of consideration to introduce and act upon a joint resolution of disapproval that are laid out in the CRA, the periods reset in their entirety in the following session of Congress. In other words, the inauguration of a new President in January 2017 would provide an opportunity for the 115th Congress to use the CRA to overturn certain midnight rules issued by President Barack Obama. (See [CRS Insight IN10437](#) and [CRS Report RL34633](#) for a more detailed discussion of this reset mechanism.)

Alternatively, Congress can add provisions to agency appropriations bills to prohibit agencies from using appropriated funds for certain rulemaking-related purposes, including finalizing, implementing, or enforcing rules. Unlike CRA joint resolutions of disapproval, however, these types of appropriations provisions do not nullify an existing regulation. Furthermore, 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).