Midnight Rulemaking

Maeve P. Carey
Analyst in Government Organization and Management

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Summary

During the final months of recent presidential administrations, federal agencies have increased the number of issued regulations. This phenomenon is often referred to as "midnight rulemaking." Various scholars and public officials have documented evidence of midnight rulemaking by several recent outgoing administrations, especially for those outgoing administrations that will be replaced by an administration of a different party.

One possible explanation for the issuance of "midnight rules" is the desire of the outgoing administration to complete its work and achieve certain policy goals before the end of its term of office—what has been termed the "Cinderella effect." Because it may be difficult to change or eliminate rules after they have taken effect, issuing midnight rules can also help ensure a legacy for a President. This may especially be true when a party change will occur in the White House.

At times, certain rules issued during the last few months of an administration have been considered by some as controversial. For example, before President William J. Clinton left office, his administration issued energy efficiency standards for washing machines and a rule setting ergonomics standards in the workplace. Shortly before the end of President George W. Bush's second term concluded, his administration finalized rules allowing states to determine whether concealed firearms may be carried in national parks and giving agencies greater responsibility to determine when and how their actions may affect species under the Endangered Species Act.

On the other hand, a recent study for the Administrative Conference of the United States (ACUS) concluded that many midnight regulations 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 cited some evidence of the strategic use of midnight rules to implement certain desired policies before leaving office, but in general, the study said that "the perception of midnight rulemaking as an unseemly practice is worse than the reality."

In the 112th Congress, companion bills entitled the Midnight Rule Relief Act of 2012 (H.R. 4607 and S. 2368) were introduced by Representative Reid Ribble and Senator Ron Johnson. The Midnight Rule Relief Act would establish a moratorium on the proposal or issuance of certain types of rules during the period between a presidential election day and inauguration day of a President's final term in office. The law would only apply in cases "in which a President is not serving a consecutive term." The House Committee on Oversight and Government Reform reported H.R. 4607 on June 1, 2012. S. 2368 was referred to the Senate Committee on Homeland Security and Governmental Affairs upon introduction.

This report provides an overview of midnight rulemaking and discusses actions that recent outgoing and incoming administrations have taken pertaining to midnight rules. It explains how an incoming President could change or eliminate midnight rules, and provides options for congressional oversight of midnight rules.

This report will be updated as events warrant.

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For example, one study documented an increase in the number of economically significant rules issued in the final year of several outgoing presidents.[2] Another study concluded that not only are more regulations finalized at the end of an outgoing President's administration, but more proposed rules (also known as notices of proposed rulemaking, or NPRMs) are issued during that period as well.[3]

Overview of Midnight Rulemaking

One possible explanation for the issuance of "midnight rules" is the desire of the outgoing administration to complete its work and achieve certain policy goals before the end of its term of office—what has been termed the "Cinderella effect."[4] As one Bush Administration official said, midnight rulemaking is like "Cinderella leaving the ball. … Presidential appointees hurried to issue last-minute 'midnight' regulations before they turned back into ordinary citizens at noon on January 20th."[5] Because it may be difficult to change or eliminate rules after they have taken effect, issuing midnight rules can also help ensure a legacy for a President—especially when an incoming administration is of a different party.

At times, certain rules issued during the last few months of an administration have been considered by some as controversial. For example, when President William J. Clinton was leaving office, his administration issued energy efficiency standards for washing machines and a rule setting ergonomics standards in the workplace. Shortly before the end of President George W. Bush's second term concluded, his administration finalized rules allowing states to determine whether concealed firearms may be carried in national parks and giving agencies greater responsibility to determine when and how their actions may affect species under the Endangered Species Act.[6]

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[1] See Jerry Brito and Veronique de Rugy, "Midnight Regulations and Regulatory Review," Working Paper No. 08-34, Mercatus Center, George Mason University, available at http://www.mercatus.org/uploadedFiles/Mercatus/Publications/Midnight%20Regulations.pdf; and Anne Joseph O'Connell, "Cleaning Up and Launching Ahead," January 2009, at http://www.americanprogress.org/issues/2009/01/pdf/regulatory_agenda.pdf.

[2] Patrick A. McLaughlin, "The Consequences of Midnight Regulations and Other Surges in Regulatory Activity," *Public Choice*, vol. 147, no. 3 (April 2011), pp. 395-412. A rule is defined as "economically significant" in Executive Order 12866 if the rule is expected to "(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities" (§3(f)).

[3] Anne Joseph O'Connell, "Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State," *Virginia Law Review*, vol. 94, no. 4 (June 2008), pp. 889-986.

[4] Jay Cochran, III, *The Cinderella Constraint: Why Regulations Increase Significantly During Post-Election Quarters* (Arlington, VA: Mercatus Center, 2001), available at http://www.mercatus.org/PublicationDetails.aspx?id=17546.

[5] Susan E. Dudley, "Reversing Midnight Regulations," *Regulation*, Spring 2001, at http://www.cato.org/pubs/regulation/regv24n1/dudley.pdf, p. 9.

[6] The Endangered Species Act is 16 U.S.C. §§1531 *et seq.*

On the other hand, a recent study for the Administrative Conference of the United States (ACUS) concluded that many midnight regulations 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)."[7] The study cited some evidence of the strategic use of midnight rules to implement certain desired policies before leaving office, but in general, the study said that "the perception of midnight rulemaking as an unseemly practice is worse than the reality."[8]

Concerns over Midnight Rulemaking

One general concern raised is that an outgoing administration may have less political accountability compared to an administration faced with the possibility of re-election. Rules that are hurried through at the end of an administration may not have the same opportunity for public input. Agencies may find that in order to issue regulations by the end of an administration, they may not have sufficient time to review and digest public comments taken during the comment period.[9]

Another concern is that the quality of the 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. For example, two scholars of administrative procedure wrote 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 justify their cost."[10] In particular, the concern 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.[11]

Finally, some have argued that the task of evaluating a previous administration's midnight rules can potentially overwhelm a new administration.[12]

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[7] Administrative Conference Recommendation 2012-2, *Midnight Rules*, adopted June 14, 2012, pp. 1-2, at http://www.acus.gov/wp-content/uploads/downloads/2012/06/Final-Recommendation-2012-2-Midnight-Rules.pdf; and Jack M. Beermann, "Midnight Rules: A Reform Agenda," draft report prepared for the consideration of the Administrative Conference of the United States, March 3, 2012, at http://www.acus.gov/wp-content/uploads/downloads/2012/03/Revised-Draft-Midnight-Rules-Report-3-13-12.pdf.

[8] Administrative Conference Recommendation 2012-2, *Midnight Rules*, p. 1.

[9] See Beermann, *Midnight Rules*, citing an example in which an agency had to review 300,000 comments in one week to issue a rule on time.

[10] Jerry Brito and Veronique de Rugy, "Midnight Regulations and Regulatory Review," *Administrative Law Review*, vol. 61, no. 1 (Winter 2009), p. 164.

[11] Under Executive Order 12866, OIRA reviews all significant rules before they are published in the *Federal Register*, both at the proposed rule stage and final rule stage. This includes a review of the rule itself and the rule's cost-benefit analysis, if one is required. See Executive Order 12866, "Regulatory Planning and Review," 58 *Federal Register* 51735, October 4, 1993.

[12] See, for example, the testimony of Michael Abramowicz, U.S. Congress, House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, *Midnight Rulemaking: Shedding Some Light*, 111th Cong., 1st sess., February 4, 2009, H. Hrg. 111-2 (Washington: GPO, 2009), pp. 236-242.

Regulatory Moratoria and Postponements Taken by Recent Incoming Presidents

One approach previous Presidents have used to control rulemaking at the start of their administrations has been the imposition of a moratorium on new regulations from executive departments and independent agencies. Such moratoria have sometimes been accompanied by a requirement that the departments and agencies postpone the effective dates of certain rules that were issued at the end of the previous President's term.[13] Also, any proposed rules that have not been published in the *Federal Register* as final rules by the time the outgoing President leaves office can be withdrawn by a new administration. However, once final rules have been published in the *Federal Register*, the only way for a new administration to eliminate or change them is to go back through the rulemaking process (see section below entitled "Eliminating or Changing Midnight Rules").[14]

Reagan Administration

On January 29, 1981, shortly after taking office, President Reagan issued a memorandum to the heads of the Cabinet departments and the EPA Administrator directing them to take certain actions that would give the new administration time to implement a "new regulatory oversight process," particularly for "last-minute decisions" made by the previous administration.[15] Specifically, the memorandum said that agencies must, to the extent permitted by law, (1) publish a notice in the *Federal Register* postponing for 60 days the effective date of all final rules that were scheduled to take effect during the next 60 days, and (2) refrain from promulgating any new final rules. Executive Order 12291, issued a few weeks later, contained another moratorium on rulemaking that supplemented, but did not supplant, the January 29, 1981, memorandum.[16] Section 7 of the executive order directed agencies to "suspend or postpone the effective dates of all 'major' rules that they have promulgated in final form as of the date of this Order, but that have not yet become effective."[17] Excluded were major rules that could not be legally postponed or suspended, and those that "for good cause, ought to become effective as final rules."[18] Agencies were also directed to prepare a regulatory impact analysis for each major rule

[13] Such presidential moratoria on rulemaking have generally exempted regulations issued by independent regulatory boards and commissions, as well as regulations issued in response to emergency situations or statutory or judicial deadlines.

[14] Under the Administrative Procedure Act (APA, 5 U.S.C. §551 *et seq.*), "rulemaking" is defined as "formulating, amending, or repealing a rule," meaning that an agency must follow the rulemaking procedures set forth by the APA to change or repeal a rule. Such procedures apply even for a change to a rule's effective date .

[15] See http://www.presidency.ucsb.edu/ws/index.php?pid=44134 for a copy of this memorandum.

[16] Executive Order 12291, "Federal Regulation," 46 *Federal Register* 13193, February 17, 1981.

[17] E.O. 12291 defined a "major" rule as "any regulation that is likely to result in: (1) An annual effect on the economy of $100 million or more; (2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets." This was essentially the same definition of "major" rule that was later enacted as part of the Congressional Review Act (CRA) in 1996 (5 U.S.C. §804(2)). See below for an in-depth discussion of how the CRA may be used to exercise congressional oversight of midnight rules.

[18] Section 7(a)(2).

suspended or postponed, and to refrain from promulgating any new final rules until a final regulatory impact analysis had been conducted.[19]

Clinton Administration

On January 22, 1993, Leon E. Panetta, the Director of OMB for the incoming Clinton Administration, sent a memorandum to the heads and acting heads of Cabinet departments and independent agencies requesting them to (1) not send proposed or final rules to the Office of the Federal Register for publication until they had been approved by an agency head appointed by President Clinton and confirmed by the Senate, and (2) withdraw from the Office of the Federal Register all regulations that had not been published in the *Federal Register* and that could be withdrawn under existing procedures.[20] The requirements did not apply, however, to any rules that required immediate issuance because of a statutory or judicial deadline. The OMB Director said these actions were needed because it was "important that President Clinton's appointees have an opportunity to review and approve new regulations." In contrast to the Reagan memorandum and Executive Order 12291, the Panetta memorandum did not instruct agencies to postpone the effective dates of any rules.

George W. Bush Administration

On January 20, 2001, Andrew H. Card, Jr., assistant to President George W. Bush and White House Chief of Staff, sent a memorandum to the heads and acting heads of all executive departments and agencies generally directing them to (1) not send proposed or final rules to the Office of the Federal Register, (2) withdraw from the Office rules that had not yet been published in the *Federal Register*, and (3) postpone for 60 days the effective dates of rules that had been published but had not yet taken effect.[21] The Card memorandum instructed agencies to exclude any rules promulgated pursuant to statutory or judicial deadlines, and to notify the OMB Director of any rules that should be excluded because they "impact critical health and safety functions of the agency."[22] The memorandum indicated that these actions were needed to "ensure that the President's appointees have the opportunity to review any new or pending regulations."[23]

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[19] Regulatory moratoria since President Reagan have been issued only by incoming Presidents who are of the opposite political party from their predecessors. President George H.W. Bush did not issue such a moratoria at the start of his term, presumably since had similar political preferences to President Reagan, his predecessor.

[20] See http://www.prop1.org/rainbow/adminrec/930122lp.htm for a copy of this memorandum.

[21] U.S. White House Office, "Regulatory Review Plan," *Federal Register*, vol. 66, no. 16, January 24, 2001, p. 7702. To view a copy of this memorandum, see http://www.whitehouse.gov/omb/inforeg/regreview_plan.pdf.

[22] In February 2002, GAO reported on the delay of effective dates of final rules subject to the Card memorandum (see Government Accountability Office, formerly the General Accounting Office, "Regulatory Review: Delay of Effective Dates of Final Rules Subject to the Administration's Jan. 20, 2001, Memorandum," GAO-02-370R, February 15, 2002). GAO indicated that 371 final rules were subject to this aspect of the Card memorandum, and federal agencies delayed the effective dates of at least 90 of them. As of the one-year anniversary of the Card memorandum, most of the 90 rules had taken effect, but one had been withdrawn and not replaced by a new rule, three had been withdrawn and replaced by new rules, and nine others had been altered (e.g., different implementation date or reporting requirement). While some agencies allowed the public to comment on the extensions of the effective dates, most agencies simply published final rules citing the Administrative Procedure Act's "good cause" or "procedural rule" exceptions to notice and comment rulemaking (as discussed later in this report, the Administrative Procedure Act allows an agency to avoid notice and comment procedures for rules of agency organization, procedure, or practice when an agency finds, for "good cause," that those procedures are "impracticable, unnecessary, or contrary to the public interest").

[23] One author noted that such practices "tended to evade judicial challenge due to their short time frames, but they did (continued...)

The George W. Bush Administration later issued another memorandum encouraging agencies to complete their rulemakings far before the end of the administration. On May 9, 2008, White House Chief of Staff Joshua B. Bolten issued a memorandum to the heads of executive departments and agencies stating that, except for "extraordinary circumstances, regulations to be finalized in this Administration should be proposed no later than June 1, 2008, and final regulations should be issued no later than November 1, 2008."[24] He also said the administrator of OIRA would "coordinate an effort to complete Administration priorities in this final year," and that the OIRA administrator would "report on a regular basis regarding agency compliance with this memorandum."[25]

Despite this initiative and statements from the White House, the number of rules that federal agencies promulgated in the final months of the Bush Administration increased.[26] One indication of this increase is the number of major final rules that were published and sent to the Government Accountability Office (GAO) pursuant to requirements in the Congressional Review Act (CRA, 5 U.S.C. §§801-808).[27] The CRA requires GAO to provide Congress with a report on each final rule that OIRA designates as a "major" rule (e.g., rules with at least a $100 million impact on the economy) within 15 calendar days of the rule being sent to GAO and Congress.[28] During the first six months of the most recent outgoing administration's final year in office (2008), the agencies published a total of 31 major final rules, but in the second six months, the agencies published 63 rules—a 103% increase.

Table 1 presents data on the number of major rules published during the last half of President Bush's and President Clinton's final two years in office. The number of major rules in the second six months of 2008 was higher than the number in the second six months of 2007 (63 major rules in 2008 compared with 41 major rules in 2007—a 54% increase).[29] This increase in the number of

(...continued)

occasion criticism." See Jeffrey S. Lubbers, ed., *A Guide to Federal Agency Rulemaking, Fourth Edition* (Chicago: ABA Publishing, 2006), pp. 121-122. For a discussion of these criticisms, see William M. Jack, "Taking Care That Presidential Oversight of the Regulatory Process is Faithfully Executed: A Review of Rule Withdrawals and Rule Suspensions Under the Bush Administration's Card Memorandum," *Administrative Law Review*, vol. 54 (Fall 2002), pp. 1479-1518. Some federal courts have considered any delay in a rule's effective date to require notice and comment rulemaking. See *Natural Resources Defense Council, Inc. v. EPA*, 683 F.2d 752, 761 (3d Cir. 1982); and *Council of the Southern Mountains v. Donovan*, 653 F.2d 573 (D.C. Cir. 1981). One such action pursuant to the Card memorandum was rejected by a court. See *Natural Resources Defense Council v. Abraham*, 355 F.3d 179, 204-05 (2d Cir. 2004).

[24] See http://www.whitehouse.gov/omb/inforeg/cos_memo_5_9_08.pdf for a copy of this memorandum. The memorandum said that agencies needed to "resist the historical tendency of administrations to increase regulatory activity in their final months."

[25] Under Executive Order 12866, OIRA reviews all significant rules before they are published in the *Federal Register*, and is the President's chief representative in the rulemaking process. See CRS Report RL32397, *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs*, by Maeve P. Carey.

[26] See Ralph Lindeman, "White House Denies Effort to Issue Last-Minute Pro-Business Regulations," *BNA Daily Report for Executives*, November 3, 2008, p. A-15, in which deputy White House press secretary Tony Fratto denied there had been an increase in rulemaking activity. Specifically, he said "We're not doing that in this administration." His comments were made in response to a report by R. Jeffrey Smith, "A Last Push to Deregulate; White House to Ease Many Rules," *Washington Post*, October 31, 2008, p. A1.

[27] The Congressional Review Act (in 5 U.S.C. §801(a)(1)(A)) requires all final rules to be sent to each house of Congress and GAO before they can take effect.

[28] 5 U.S.C. §801(a)(2)(A).

[29] The biggest differences between 2007 and 2008 were in the months of October and November. In 2007, federal agencies submitted 13 major rules to GAO in October and November, but in the same two months in 2008, the agencies submitted 33 major rules—a 154% increase.

major rules published was also apparent in the final months of the Clinton Administration. According to the GAO database, in the final six months of 2000, agencies published 52 major rules. This represented a 73% increase over the same period in the previous year, during which the agencies published 30 major rules.

Table 1. Major Rules Published in the Second Half of Year

Administration	Year	Number of Major Rules Published
George W. Bush	2008	63
	2007	41
William J. Clinton	2000	52
	1999	30

Source: Congressional Research Service, using data from the Government Accountability Office's Federal Rules Database, at http://www.gao.gov/legal/congressact/fedrule.html.

Note: Data provided only include rules published in the *Federal Register* between July 1 and December 31 of the year indicated.

There is also evidence of "midnight rulemaking" in the increased number of "economically significant" rules that OIRA reviews pursuant to Executive Order 12866.[30] **Table 2** presents data on the number of "economically significant" rules that OIRA reviewed at the end of the Bush and Clinton Administrations. According to the Regulatory Information Service Center, from July 1, 2008, through December 31, 2008, OIRA reviewed a total of 82 "economically significant" rules—a 64% increase when compared to the same period in 2007 (50 rules).[31] During the Clinton Administration, the number of "economically significant" rules went up slightly: OIRA reviewed 53 "economically significant" rules during the final six months of 2000, compared to 48 "economically significant" rules during that period in 1999 (a 10% increase).

[30] Executive Order 12866 requires that agencies submit their "significant" regulatory actions, including both proposed and final rules, to OIRA for review. Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as any regulatory action that is "likely to result in a rule that may (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order." Rules that fall into the first of these categories are "economically significant" and also require the agency to submit a detailed cost-benefit analysis to OIRA.

[31] See http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init to access this database.

Table 2. "Economically Significant" Rules Reviewed at the Office of Information and Regulatory Affairs (OIRA) in the Second Half of Year

Administration	Year	Number of "Economically Significant" Rules Reviewed by OIRA
George W. Bush	2008	82
	2007	50
William J. Clinton	2000	53
	1999	48

Source: Congressional Research Service, using data from the "Review Counts" feature of OIRA's website, at http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init.

Notes: Data provided only include rules reviewed by OIRA between July 1 and December 31 of the year indicated.

Obama Administration

On January 20, 2009, Rahm Emanuel, Assistant to President Barack Obama and Chief of Staff, sent a memorandum to the heads of executive departments and agencies requesting that they generally (1) not send proposed or final rules to the Office of the Federal Register, (2) withdraw from the Office rules that had not yet been published in the *Federal Register*, and (3) "consider" postponing for 60 days the effective dates of rules that had been published in the *Federal Register* but had not yet taken effect.[32] The Director or Acting Director of OMB was allowed to except certain rules from these requirements for emergency or "other urgent circumstances relating to health, safety, environmental, financial, or national security matters." One of the major differences between the Emanuel memorandum and the Card memorandum is in the degree of deference shown to the rulemaking agencies. For example, whereas the Emanuel memorandum requested agencies to "consider" extending the effective dates of rules that had not taken effect, the Card memorandum simply instructed the agencies to do so. Also, the Emanuel memorandum stated that when the effective dates of rules are extended, the agencies should allow interested parties to comment for 30 days "about issues of law and policy raised by those rules." The Card memorandum had no similar provision regarding public comment.

In addition, on January 21, 2009, Peter R. Orszag, OMB Director, sent a memorandum to the heads of executive departments and agencies providing guidance on implementing the third provision of the Emanuel memorandum.[33] The Orszag memorandum said that agencies' decisions on whether to extend the effective dates of rules should be based on such considerations as whether the rulemaking process was procedurally adequate, whether the rule reflected proper consideration of all relevant facts, and whether objections to the rule were adequately considered. The Orszag memorandum also said that agencies should seek public comments regarding both the agencies' "contemplated extension of the effective date and the rule in question." Agencies were also instructed to consult with OIRA and the Department of Justice's Office of Legal Counsel

[32] Executive Office of the President, "Memorandum for the Heads of Executive Departments and Agencies," 74 *Federal Register*, 4435, January 26, 2009.

[33] See http://ombwatch.org/regs/PDFs/OrszagMemo09-08.pdf for a copy of this memorandum.

before extending the effective dates of any rules, particularly when the rules were scheduled to take effect before public comments could be solicited.

Although many of the rules that were issued near the end of the Bush Administration had taken effect by January 20, 2009, the Emanuel memorandum delayed the effective date of some rules.[34] In addition, federal agencies withdrew a number of rules that had been sent to the Office of the Federal Register but had not been published.

Eliminating or Changing Midnight Rules

Once an outgoing administration's final rule has been published in the *Federal Register*, the only way for the incoming administration to change or undo the rule is to follow the federal rulemaking process. As explained by Susan Dudley, who served as President George W. Bush's OIRA Administrator, "agencies cannot change [midnight] regulations arbitrarily; instead, they must first develop a factual record that supports the change in policy."[35]

Under informal rulemaking procedures established by the Administrative Procedure Act (APA, 5 U.S.C. §551 *et seq*.), agencies are generally required to publish a notice of proposed rulemaking (NPRM) in the *Federal Register*, allow "interested persons" an opportunity to comment on the proposed rule, and, after considering those comments, publish the final rule along with a general statement of its basis and purpose. The APA does not specify how long rules must be available for comment, but agencies commonly allow at least 30 days. The APA generally says that the final rule cannot become effective until at least 30 days after its publication. These requirements in the APA apply when an agency is issuing, amending, or repealing a rule.

However, there are ways that the rulemaking process can be shortened. The APA (5 U.S.C. §553) states that full "notice and comment" procedures are not required when an agency finds, for "good cause," that those procedures are "impracticable, unnecessary, or contrary to the public interest." Agencies can also make their rules take effect in less than 30 days by invoking the "good cause" exception.[36] When agencies use the good cause exception, the APA requires that they explicitly say so and provide a rationale for the exception's use when the rule is published in the *Federal Register*.

If an agency had "good cause" to change or repeal a midnight rule in an expedited manner, it could use one of two rulemaking procedures designed not to involve NPRMs. First, through a

[34] For example, the Forest Service published a final rule in the *Federal Register* delaying the effective date of a December 29, 2008, final rule regulating the sale of certain forest products. The agency said the January 28, 2009, effective date was being delayed for 60 days in accordance with the Emanuel memorandum, and solicited public comments for 30 days on "any issues or concerns on the policy raised by the December rule." See U.S. Department of Agriculture, Forest Service, "Sale and Disposal of National Forest System Timber; Special Forest Products and Forest Botanical Products," 74 *Federal Register* 5107, January 29, 2009.

[35] Dudley, "Reversing Midnight Regulations," p. 9.

[36] The APA also allows rules to take effect in less than 30 days if the rule grants or recognizes an exemption or relieves a restriction, or if the rule is an interpretative rule or statement of policy. The APA also provides explicit exceptions to the NPRM requirement for certain categories of regulatory actions, such as rules dealing with military or foreign affairs; agency management or personnel; or public property, loans, grants, benefits, or contracts. Further, the APA says that the NPRM requirements do not apply to interpretative rules; general statements of policy; or rules of agency organization, procedure, or practice (5 U.S.C. §553(b)(3)(A)).

procedure known as "interim final" rulemaking, an agency issues a final rule without an NPRM that is generally effective immediately, but with a post-promulgation opportunity for the public to comment. If the public comments persuade the agency that changes are needed in the interim final rule, the agency may revise the rule by publishing a final rule reflecting those changes. Interim final rulemaking can be viewed as another particular application of the good cause exception in the APA, but with the addition of a comment period after the rule has become effective.[37] Second, "direct final" rulemaking involves agency publication of a rule in the *Federal Register* with a statement that the rule will be effective on a particular date unless an adverse comment is received within a specified period of time (e.g., 30 days). However, if an adverse comment is filed, the direct final rule is withdrawn and the agency may publish the rule as a proposed rule under normal NPRM procedures. Direct final rulemaking can be viewed as a particular application of the APA's good cause exception in which agencies claim NPRMs are "unnecessary."[38]

The legislative history of the APA makes it clear that Congress did not believe that the act's good cause exception to the notice and comment requirements should be an "escape clause."[39] A federal agency's invocation of the good cause exception (or other exceptions to notice and comment procedures) is subject to judicial review. After having reviewed the totality of circumstances, the courts can and sometimes do determine that an agency's reliance on the good cause exception was not authorized under the APA.[40]

In sum, if an agency wanted to change or eliminate midnight rules issued by the outgoing administration, the agency would have to follow the APA's general requirements for rulemaking. There are certain procedures that have been established that may speed up the process. However, these expedited rulemaking procedures are only available to agencies when the agencies have "good cause" to use them.

Options for Congress: Oversight of Rules

Congress may examine the issuance of proposed and final "midnight" regulations at the end of an administration and conclude that they should be allowed to go forward. Should Congress conclude otherwise, though, various options are available—even for rules that have already taken effect.

[37] For more, see Michael Asimow, "Interim Final Rules: Making Haste Slowly," *Administrative Law Review*, 51 (Summer 1999), pp. 703-755.

[38] For more, see Ronald M. Levin, "More on Direct Final Rulemaking: Streamlining, Not Corner Cutting," *Administrative Law Review*, 51 (Summer 1999), pp. 757-766.

[39] Senate Committee on the Judiciary, *Administrative Procedure Act: Legislative History*, Senate Document 248, 79th Congress, 2nd sess. (1946).

[40] For discussions of these court cases, see Ellen R. Jordan, "The Administrative Procedure Act's 'Good Cause' Exemption," *Administrative Law Review*, 36 (Spring 1984), pp. 113-178; and Catherine J. Lanctot, "The Good Cause Exception: Danger to Notice and Comment Requirements Under the Administrative Procedure Act," *Georgetown Law Journal*, 68 (Feb. 1980), pp. 765-782. See also *American Federation of Government Employees, AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981); and *Mobay Chemical Corp. v. Gorsuch*, (682 F.2d 419, 426 (3rd Cir.), cert. denied, 459 U.S. 988 (1982)). In another case (*Action on Smoking and Health v. CAB*, 713 F.2d 795, 800 (D.C. Cir. 1983)), the court said that allowing broad use of the good cause exception would "carve the heart out of the statute."

Congress can use its legislative power to overturn or change a regulation that has been issued by an agency. Congress can also use its legislative power to 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 while a rule is under development and before it has been finalized.

In addition, Congress may use the expedited procedures provided in the Congressional Review Act to disapprove agency rules, including, in some cases, rules issued in a previous session of Congress. Alternatively, Congress can add provisions to agency appropriations bills to prohibit certain rules from being implemented or enforced. These two options are discussed in detail below.

Congressional Review Act

Congress may use its general powers to overturn agency rules by regular legislation. The Congressional Review Act (CRA), enacted in March 1996, was an attempt by Congress to reassert control over agency rulemaking by establishing a special set of expedited or "fast track" legislative procedures for this purpose, primarily in the Senate.[41]

In short, the CRA requires that all final rules (including rules issued by independent boards and commissions) be submitted to both houses of Congress and to GAO before they can take effect. Members of Congress have 60 "days of continuous session" to introduce a joint resolution of disapproval beginning on the date a rule has been received by Congress (hereafter referred to as the "initiation period").[42] The Senate has 60 "session days" from the date the rule is received by Congress and published in the *Federal Register* to use expedited procedures to act on a resolution of disapproval (hereafter referred to as the "action period").[43] For example, once a joint resolution has reached the floor of the Senate, the CRA makes consideration of the measure privileged, prohibits various other dilatory actions, disallows amendments, and limits floor debate to a maximum of 10 hours. If passed by both houses of Congress, the joint resolution is then presented to the President for signature or veto. If the President signs the resolution, the CRA specifies not only that the rule "shall not take effect" (or shall not continue if it has already taken effect), but also that the rule may not be reissued in "substantially the same form" without subsequent statutory authorization.[44] Also, the act states that any rule disapproved through these procedures "shall be treated as though such rule had never taken effect."[45] If, on the other hand, the President

[41] The following discussion is a synopsis of more detailed information provided in other CRS reports. For a detailed discussion of CRA disapproval procedures, see CRS Report RL31160, *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*, by Richard S. Beth. For a discussion of the "carryover" procedures, see CRS Report RL34633, *Congressional Review Act: Disapproval of Rules in a Subsequent Session of Congress*, by Curtis W. Copeland and Richard S. Beth.

[42] "Days of continuous session" excludes all days when either the House of Representatives or the Senate is adjourned for more than three days, that is, pursuant to an adjournment resolution.

[43] "Session days" include only calendar days on which a chamber is in session. Once introduced, resolutions of disapproval are referred to the committees of jurisdiction in each house of Congress. The House of Representatives would consider the resolution under its general procedures, very likely as prescribed by a special rule reported from the Committee on Rules. In the Senate, however, if the committee has not reported a disapproval resolution within 20 calendar days after the regulation has been submitted and published in the *Federal Register*, then the committee may be discharged and the resolution placed on the Senate calendar if 30 Senators submit a petition to do so.

[44] 5 U.S.C. §801(b)(2).

[45] 5 U.S.C. §801(f).

vetoes the joint resolution, then (as is the case with any other bill) Congress can override the President's veto by a two-thirds vote in both houses of Congress.

Under most circumstances, it is likely that the President would veto such a resolution in order to protect rules developed under his own administration, and it may also be difficult for Congress to muster the two-thirds vote in both houses needed to overturn the veto. Of the approximately 56,000 final rules that have been submitted to Congress since the legislation was enacted in March 1996, the CRA has been used to disapprove only one rule—the Occupational Safety and Health Administration's November 2000 final rule on ergonomics.[46]

The March 2001 rejection of the ergonomics rule was the result of a specific set of circumstances created by a transition in party control of the presidency. The majority party in both houses of Congress was the same as the party of the incoming President (George W. Bush). When the new Congress convened in 2001 and adopted a resolution disapproving the rule published under the outgoing President (William J. Clinton), the incoming President did not veto the resolution. Congress may be most able to use the CRA successfully to disapprove rules in similar, transition-related circumstances.[47]

CRA "Carryover" Provisions

The ergonomics disapproval was also an example of the "carryover" provisions in the CRA. Midnight rules issued in the final months of an administration are often subject to reconsideration under the CRA in the next session of Congress. Section 801(d) of the CRA provides that, if Congress adjourns its annual session *sine die* less than 60 *legislative days* in the House of Representatives or 60 *session days* in the Senate after a rule is submitted to it, then the rule is subject, during the following session of Congress, to (1) a new initiation period in *both* chambers and (2) a new action period in the Senate.[48] The purpose of this provision is to ensure that *both* houses of Congress have sufficient time to consider disapproving rules submitted during this end-of-session "carryover period." In any given year, the carryover period begins after the 60th legislative day in the House or session day in the Senate before the *sine die* adjournment, whichever date is *earlier*. The renewal of the CRA process in the following session occurs even if no resolution to disapprove the rule had been introduced during the session when the rule was submitted.

For purposes of this new initiation period and Senate action period, a rule originally submitted during the carryover period of the previous session is treated as if it had been published in the *Federal Register* on the 15th legislative day (House) or session day (Senate) after Congress reconvenes for the next session. In each chamber, resolutions of disapproval may be introduced at any point in the 60 days of continuous session of Congress that follow this date, and the Senate

[46] U.S. Department of Labor, Occupational Safety and Health Administration, "Ergonomics Program," 65 *Federal Register* 68261, November 14, 2000. Although the CRA has been used to disapprove only one rule, it may have other, less direct or discernable effects (e.g., keeping Congress informed about agency rulemaking and preventing the publication of rules that may be disapproved).

[47] See, for example, Dudley, "Reversing Midnight Regulations," p. 9, who noted that the "veto threat is diminished [after a transition], since the president whose administration issued the regulations is no longer in office." See also testimony of Curtis W. Copeland, in U.S. Congress, House Committee on Government Reform, Subcommittee on Regulatory Affairs, *The Effectiveness of Federal Regulatory Reform Initiatives*, 109th Cong., 1st sess., July 27, 2005, p. 13.

[48] "Legislative days" end each time a chamber adjourns and begin each time it convenes after an adjournment.

may use expedited procedures to act on the resolution during the 60 days of session that follow the same date.

Appropriations Provisions

Although the CRA has been used only once to overturn an agency rule, Congress has frequently used provisions added to agency appropriations bills to affect rulemaking and regulations, and could choose to apply such provisions to midnight rules. Most frequently, such provisions prohibit the use of funds for certain rulemaking-related purposes.[49] A previous CRS analysis of the Consolidated Appropriations Act for 2008 revealed nearly two dozen such provisions in the act.[50] These provisions generally fell into four categories: (1) prohibitions on the use of funds for the finalization of particular proposed rules, (2) prohibitions on the use of funds to develop regulations with regard to particular statutes or issues, (3) prohibitions on the use of funds for implementation or enforcement of rules, and (4) conditional prohibitions of the use of funds for the development or implementation of particular rules.

Restrictions on the use of funds in appropriations bills can enable Congress to have a substantial effect on agency rulemaking and regulatory activity beyond the introduction of joint resolutions of disapproval pursuant to the CRA. However, unlike CRA joint resolutions of disapproval, these types of appropriations provisions do not nullify an existing regulation (i.e., remove it from the *Code of Federal Regulations*).[51] Therefore, any final rule that has taken effect and been codified in the *Code of Federal Regulations* will continue to be binding law—even if language in the relevant regulatory agency's appropriations act prohibits the use of funds to enforce the rule. Regulated entities are still required to adhere to applicable requirements (e.g., installation of pollution control devices, submission of relevant paperwork), even if violations are unlikely to be detected and enforcement actions cannot be taken by federal agencies.

There may be additional limits on the ability to influence agency rulemaking through restrictions on the use of funds based on the duration such provisions are effective. 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).[52] In these instances, any restriction that is not repeated in the next relevant appropriations act or enacted in other measures is no longer binding on the relevant agency or agencies. Appropriations provisions, however, may

[49] Provisions in appropriations acts that affect rulemaking may also require agencies to take certain actions. For example, agencies may be directed to develop rules in particular areas or enforce existing rules in particular ways. This section does not discuss these types of provisions. For further information, see CRS Report RL34354, *Congressional Influence on Rulemaking and Regulation Through Appropriations Restrictions*, by Curtis W. Copeland, pp. 1-5. For general information on appropriations restrictions, see CRS Report R41634, *Limitations in Appropriations Measures: An Overview of Procedural Issues*, by Jessica Tollestrup.

[50] A full analysis of these provisions is found in CRS Report RL34354, *Congressional Influence on Rulemaking and Regulation Through Appropriations Restrictions*, by Curtis W. Copeland.

[51] Provisions have been included in appropriations acts that directly affect the substance of existing or future regulations, but these are not drafted as funding prohibitions.

[52] See U.S. Government Accountability Office, formerly the General Accounting Office, *Principles of Appropriations Law, Third Edition, Volume I*, GAO-04-261SP, January 2004, p. 2-34, which states that, "Since an appropriation act is made for a particular fiscal year, the starting presumption is that everything contained in the act is effective only for the fiscal year covered. Thus, the rule is: A provision contained in an annual appropriation act is not to be construed to be permanent legislation unless the language used therein or the nature of the provision makes it clear that Congress intended it to be permanent."

include language that causes them to be effective for more than one fiscal year or permanently (e.g., the use of the term "hereafter" or other words of futurity).

Appropriations restrictions on regulatory activities also have varying applicability. As most restrictions on the use of funds are in appropriations bills that fund particular agencies or groups of agencies, these provisions are generally applicable only to the agencies funded by that appropriations measure, unless otherwise specified. Some provisions are worded to affect agencies that are funded in other appropriations bills (e.g., those that prohibit the use of funds in "this or any other Act" to publish or implement regulations).[53] In addition, some regulatory prohibitions on the use of funds are designated as "general provisions" that are "government-wide" and, therefore, applicable to virtually all federal agencies.[54]

Appropriations prohibitions that seek to restrict regulatory actions may not be effective in preventing such action from occurring in certain circumstances. Some federal regulatory agencies derive a substantial amount of their operating funds from sources other than congressional appropriations (e.g., user fees), and the use of those funds to develop, implement, or enforce rules may not be legally constrained by language preventing the use of appropriated funds.[55] Also, some federal regulations (e.g., many of those issued by the Environmental Protection Agency and the Occupational Safety and Health Administration) are primarily implemented or enforced by state or local governments, and those governments may have sources of funding that are independent of the federal funds that are restricted by the appropriations provisions. Some state or local governments may also have their own statutory and regulatory requirements that are the same as or similar to the federal rules at issue, or may even go beyond federal standards.[56] If state or local funds or legal authorities are used to develop, implement, or enforce regulations, those actions would not appear to be constrained by statutory provisions limiting the use of *federal* funds to restrict action on particular *federal* laws and regulations.[57]

Agencies may also attempt to find alternative ways around provisions prohibiting the use of appropriated funds for rulemaking or other regulatory actions. For example, if an agency is not permitted to use its appropriation to issue a rule on a particular issue, it could attempt to achieve the result through other means, such as through the use of non-binding guidance documents.[58]

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[53] See U.S. Government Accountability Office, formerly the General Accounting Office, *Principles of Appropriations Law*, p. 2-33, which says that a general provision "may apply solely to the act in which it is contained ('No part of any appropriation contained in this Act shall be used ...'), or it may have general applicability ('No part of any appropriation contained in this or any other Act shall be used ...')."

[54] For example, for FY2012, Title VII of Division C of the Consolidated Appropriations Act was designated as "General Provisions—Government-Wide."

[55] Others, however, take the view that even these non-appropriated funds must be at least figuratively deposited into the Treasury, and that "all spending in the name of the United States must be pursuant to legislative appropriation." Kate Stith, "Congress' Power of the Purse," *The Yale Law Journal*, vol. 97 (1988), p. 1345.

[56] For example, under the Occupational Safety and Health Act, states may set standards for hazards such as ergonomic injury for which no federal standard has been established. See U.S. General Accounting Office, *Regulatory Programs: Balancing Federal and State Responsibilities for Standard Setting and Implementation*, GAO-02-495, March 2002.

[57] See U.S. Government Accountability Office, *Principles of Federal Appropriations Law, Third Edition, Volume II*, GAO-06-382, February 2006, which says that, unless stated otherwise, expenditures by recipients of federal grants "are not subject to all the same restrictions and limitations imposed on direct expenditures by the federal government. For this reason, grant funds in the hands of a grantee have been said to largely lose their character and identity as federal funds."

[58] See Office of Management and Budget, "Final Bulletin for Agency Good Guidance Practices," 72 *Federal Register* 3432, January 25, 2007. OMB issued the bulletin, in part, because of concerns that agencies were treating guidance (continued...)

Another possibility is that if Congress restricts one agency or group of agencies from issuing a rule on a particular topic, another agency with similar or overlapping statutory authority could be assigned that responsibility, provided that the other agency has such authority to issue the rule.

Midnight Rulemaking Proposals in the 112th Congress

Companion bills entitled the Midnight Rule Relief Act of 2012 (H.R. 4607 and S. 2368) were introduced by Representative Reid Ribble and Senator Ron Johnson in April 2012. The House Committee on Oversight and Government Reform reported H.R. 4607 on June 1, 2012. S. 2368 was referred to the Senate Committee on Homeland Security and Governmental Affairs upon introduction. In the House of Representatives, the text of H.R. 4607, along with texts of a number of other bills related to rulemaking, were incorporated into Rules Committee Print 112-28.[59] The Rules Committee version of H.R. 4607 is discussed in this section.[60]

The Midnight Rule Relief Act would establish a moratorium on the proposal or finalization of certain types of rules during the period between a presidential election day and inauguration day of a President's final term in office. The law would only apply in cases "in which a President is not serving a consecutive term."[61]

If enacted, the Midnight Rule Relief Act would prevent a President from proposing or finalizing certain "major" rules during the covered period.[62] The bill would apply to any major rule that qualified as a "midnight rule." Specifically, a "midnight rule" is defined in the bill as "an agency statement of general applicability and future effect, issued during the moratorium period, that is intended to have the force and effect of law and is designed—(A) to implement, interpret, or prescribe law or policy; or (B) to describe the procedure or practice requirements of an agency."[63]

The bill contains a number of exceptions to the moratorium. First, it creates an exception under which agencies can issue a rule that has a previously established statutory or judicial deadline that falls during the moratorium period.[64] The bill also requires that the OIRA Administrator publish a

(...continued)

documents as binding rules. Nevertheless, as OMB points out, guidance documents can have significant effects on regulated entities.

[59] http://rules.house.gov/Media/file/PDF_112_2/LegislativeText/CPRT-112-HPRT-RU00-HR4078.pdf.

[60] The Rules Committee made some changes to the text of H.R. 4607 as reported by the Committee on Oversight and Government Reform.

[61] Section 205(3).

[62] Specifically, the bill says that "an agency may not propose or finalize any midnight rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds is likely to result in an annual cost to the economy of $100,000,000 or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, small entities, or State, local, or tribal governments or communities." This definition is similar to the definition of "economically significant" rules from E.O. 12866. However, the bill would only apply to a subset of these rules; see discussion in main text of this memorandum.

[63] Section 205(4). The "moratorium period" is the period between election day and inauguration day.

[64] The bill does not appear to explicitly indicate whether an agency may issue a rule during the moratorium whose deadline has already passed. It appears that the agency would not be able to issue such a rule.

list of deadlines to which this exception may apply. The list must be published in the *Federal Register* no later than 30 days after the moratorium begins. Second, the President may choose to exempt a rule from the moratorium if he determines that the rule is "(1) necessary because of an imminent threat to health or safety or other emergency; (2) necessary for the enforcement of criminal or civil rights laws; (3) necessary for the national security of the United States; or (4) issued pursuant to any statute implementing an international trade agreement."[65] Finally, the bill contains an exception for a midnight rule that the OIRA Administrator certifies in writing to be a deregulatory measure that is aimed at repealing an existing rule. If a rule falls under the second or third exceptions listed here, within 30 days of the determination of such an exception, the head of the issuing agency must publish the rule in the *Federal Register*.

The agencies covered by the Midnight Rule Relief Act are those covered by the APA, which includes most executive branch agencies. However, H.R. 4607 would exclude the Board of Governors of the Federal Reserve, the Federal Open Market Committee, and the United States Postal Service (USPS).[66]

Author Contact Information

Maeve P. Carey
Analyst in Government Organization and Management
mcarey@crs.loc.gov, 7-7775

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[65] Section 4(a).

[66] See 5 U.S.C. §551(1) for other exceptions to the definition of "agency" used in this bill, including Congress, the courts of the United States, and certain military authorities.