

The Midnight Regulation Phenomenon

By: Susan E. Dudley | December 2, 2020

In brief...

“Midnight regulations” occur between an election and the end of a presidential administration. There is a trend across administrations, regardless of party, to increase regulatory activity during this time period. There is also, unfortunately, a decrease in the quality of corresponding regulatory impact analysis.

It’s officially midnight in Washington, when an outgoing presidential administration rushes to complete its priorities before a new administration takes office. Without support from Congress, presidents in their final days must rely on actions they can take unilaterally, leading to the phenomenon known as “[midnight regulation](#).” This term seems to have entered the Washington lexicon in 1980 to describe the increase in regulatory output at the end of the Carter administration, but the pattern [extends](#) much further back.

In addition to anecdotal information, our [research](#) has found a statistically-significant increase in regulatory output in the last three months of a presidency. Sofie Miller and Daniel Perez found that presidents issue about three times as many regulations in their post-election quarter as they do in their earlier years in office. This holds regardless of party, and there is little reason to expect the Trump administration will behave differently than previous administrations. In fact, the federal regulatory agenda published in July [includes](#) an ambitious number of regulations on deck to be published.

Why do we care about midnight regulations? It is true that not all regulations issued during the midnight period are necessarily problematic. Promulgating a regulation takes time, and some of the regulations published during the final few months of an administration are culminations of the normal notice-and-comment process begun much earlier. From initiation to final publication, a regulation can easily take four years or more to complete.

More concerning are rules that are rushed into place without the thoughtful analysis, internal review, and solicitation and evaluation of public comment that mark good regulatory policy. Indeed, my colleague Jerry Ellig and coauthors [have found](#) that regulations issued during the midnight quarter tend to be supported by lower quality regulatory impact analysis. These hurried regulations may be motivated by a desire to achieve policies that might not have survived the checks and balances that restrain actions during normal periods, or to hamstring incoming officials with different policy goals.