



Insight

An Update on Trump Midnight Regulations as the Biden “Day” Breaks

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EXECUTIVE SUMMARY

- The Trump Administration appears to have had one of the most pronounced “midnight regulation” periods of any recent administration, with the pace of rulemaking activity after Election Day 2020 increasing nearly four-fold from its pre-election clip.
- Despite its broad deregulatory posture, the Trump midnight rules were so slanted to the cost-increasing side that they provided 93 percent of the net costs for the entire term.
- While midnight rulemaking attempts to secure certain regulatory priorities before the transfer of executive power, the incoming Biden Administration will have opportunities to review and either adjust or rescind some of Trump’s final actions.

INTRODUCTION

Last November, in light of renewed interest into the issue due to the result of the president election, the American Action Forum (AAF) briefly [examined historical data](#) regarding the practice commonly known as “midnight regulation.” Midnight regulations are those published from Election Day up through the inauguration of the new administration. Traditionally, they represent the “last gasp” of an outgoing administration as it pushes through rulemakings that it expects its successor to either directly withdraw or let wither away in limbo. With the Trump Administration officially concluding, it is worth updating this analysis to place the Trump record in historical context. The relevant data of Trump’s midnight period show both a slightly more pronounced increase in the rate of regulatory activity relative to his recent predecessors and, perhaps more interesting, a dramatically higher share of net regulatory costs imposed compared to the rest of his term.

REGULATORY PACE

As noted in AAF’s previous analysis, one area to examine the effect of midnight regulation is in how many final rules an administration clears for review during that period relative to its pre-Election Day pace. The following table includes data on Trump’s term as well as his three most recent predecessors.

Midnight Rule Review Pace

<u>Administration</u>	<u>Midnight Days</u>	<u>Midnight Rules Reviewed</u>	<u>Midnight Rate (Rules/Day)</u>	<u>Pre-Midnight Rules</u>	<u>Pre-Midnight Days</u>	<u>Pre-Midnight Rate (Rules/Day)</u>
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Clinton	73	139	1.9	4429	2849	1.6
Bush	76	119	1.6	2532	2846	0.9
Obama	72	137	1.9	1968	2850	0.7
Trump	77	138	1.8	636	1384	0.5

The Trump Administration’s midnight regulation pace is remarkably similar to other recent administrations. At 1.8 rules per day, it is ever-so-slightly behind the pace of Clinton and Obama yet still somewhat faster than Bush’s 1.6 rules per day. The difference between its midnight pace and its pre-midnight pace, however, is more notable. The uptick in regulation reviews during its midnight period represents a 390 percent increase in activity from its pre-midnight period – the largest gap among the administrations examined here.

This shift is all the more interesting when one considers that, likely due to President Trump’s well-documented yet futile challenges to the election results, there is [evidence](#) that some officials were still planning for a second term for at least some period of time post-Election Day. The dynamic of midnight regulation for an administration facing a second term is inherently moot. The contrast between this apparent sentiment and what actually happened makes this result even more surprising.

REGULATORY IMPACT

The pace of rules cleared by an administration is only one part of the regulatory activity picture, however. Another aspect worth examining is what those various rules represent in terms of estimated real-world impact. Through its [RegRodeo](#) project, AAF has tracked agency estimates of costs or savings for rules going back to 2005. Using this data, we can examine trends through at least the Obama Administration and the second half of the Bush Administration. In order to make an apples-to-apples comparison, the following table includes the data of Bush’s and Obama’s final terms.

Comparing Midnight Rule Impacts to Final 4-Year Term Overall

<u>Administration</u>	<u>Midnight Rule Costs (\$ Billion)</u>	<u>Total 4-Year Term Costs (\$ Billion)</u>	<u>Midnight Share</u>
Trump	37.5	40.4	93%
Obama	40.7	394.8	10%
Bush	77.4	171.6	45%

As the data show, the Trump midnight period was clearly a major part of the administration’s term-long total net cost figure of **\$40.4 billion** in new costs. There were, of course, dozens of rules during the rest of Trump’s term with billions of dollars in costs or savings individually, but they all netted out to roughly \$2.9 billion. The \$37.5 billion in midnight costs happens when, by way of illustration, the most significant *regulatory action* imposes **\$34.5 billion** in costs while the most significant *deregulatory action* yields only **\$4.5 billion** in present value savings. Whether wholly intentional or not, the Trump Administration ended on a net-regulatory note.

THE BIDEN EFFECT

While outgoing administrations try to utilize the midnight period to get certain rules across the finish line free

from their successor's objections, they are not always entirely out of the woods. There are still levers by which the Biden Administration can chip away at Trump's midnight rules. The beginning of the Biden Administration has already brought many executive orders, memos, and other such directives regarding significant shifts in its approach to regulatory policy.

Among these is the Regulatory Freeze [memo](#), a fairly standard document from any incoming administration that suspends pending rulemaking activity so that the new administration can figure out which actions align with its policy preferences. With regards to Trump midnight rules, the most significant provision of this memo is Section 3, which directs agencies to postpone the effective date of "rules that have been published in the Federal Register, or rules that have been issued in any manner, but have not taken effect," so that the administration can further review "any questions of fact, law, and policy the rules may raise."

Most rules will have at least some lag between their publication date and their effective date (typically 30 days). According to Federal Register [data](#), there were 197 "final rule" documents published during the midnight period that had an effective date on or after January 20, 2021. Many of these documents are either notices of corrections to actual rules or relatively mundane, routine regulatory actions. While it is difficult to know exactly how the new administration will handle each rule, there are some clear potential targets. For instance, there are eight rules from the midnight period with outstanding effective dates that are quantitatively deregulatory, bringing \$6.4 billion in cumulative savings. One can expect that, in the interest of further contrasting with Trump's deregulatory posture, the Biden Administration will likely focus its most vigorous review on these rules.

Beyond this administrative moratorium and review process, the Congressional Review Act (CRA) also looms large. As noted in AAF's [review](#) of "2020: The Year in Regulation," the CRA can apply to a number of Trump Administration rules in 2020 due to its "look-back" provision. While that aspect of the law covers midnight regulations up through December 31, 2020, any of the rules from January 1, 2021, through January 19, 2021, are subject to standard CRA scrutiny within 60 days of their transmission to Congress. Thus, all of Trump's midnight rules are subject to a resolution of disapproval under the law one way or another.

CONCLUSION

The transition between administrations brings yet another midnight rulemaking period to a close. Examining the Trump contribution to this historical phenomenon yields some important findings. On one hand, the consistency of pace in regulatory activity across multiple administrations' midnight periods bolsters the idea that this is an important window of rulemaking worth monitoring. On the other hand, the specific trends of the Trump midnight period help highlight how unique his term was with regards to regulatory policy. Stay tuned for how the Biden Administration may affect that legacy.