



“Executive Overreach” and “Midnight Regulations” – Debunking the Latest Attacks on Public Protections

In their latest unfounded attacks on public protections, industry and conservatives have complained of executive “overreach.” This allegation been used to attack everything from the long delayed silica dust standard to the updated ozone rule to the campus sexual assault guidance document. Opponents of these commonsense safeguards also are trying to discredit new rules finalized in the last year of the administration by labeling them as “midnight” regulations.

Flawed Logic

The attack on so-called “midnight” regulations is based on a fatally flawed premise: that regulations proposed or finalized during the last year of an administration are rushed and inadequately vetted. For many of these rules, the opposite is true. Dozens of rules set to be finished during this period have been in the regulatory process for years or decades, having been initiated during President Barack Obama’s first term and, in some cases, during previous administrations.

The notion that executive branch agencies are overstepping their bounds simply by issuing new regulations or guidance documents is equally flawed. Every rule an agency issues stems directly from congressionally enacted legislation. In many instances, agencies would be acting contrary to the law by *not* issuing rules.

Furthermore, agency guidance documents play a vital role in the implementation of regulations by addressing questions or circumstances that were not foreseen at the time a rule was issued. Because they promote clarity, eliminate uncertainty and are generally non-binding, guidance documents frequently are welcomed by the regulated community.

Policies that regulated industries and congressional conservatives happen to disagree with do not constitute executive overreach. Executive overreach requires a rule to have exceeded an agency’s statutory authority. The courts have and will continue to strike down any rules that cross this line.

Congressional Crusade

Industry’s allies in Congress have leveled these and other unfounded charges against executive branch agencies and have held multiple hearings trumpeting their concerns. The U.S. House Judiciary Committee has formed an “Executive Overreach” task force to provide an ongoing forum for these lines of attack.

The attacks in Congress also have taken the form of anti-regulatory legislation. U.S. Sen. Jodi Ernst (R-Iowa) and U.S. Rep. Tim Walberg (R-Mich.) introduced the Midnight Rules Relief Act (S. 2582/H.R. 4612), which places a blanket moratorium on any new proposed or final major regulations issued during the final months of an administration. U.S. Rep. Tom Price (R-Ga.) followed up with the End Executive Overreach Act (H.R. 4956), which would defund any new executive orders and suspend agency rulemaking authority.

Attacked Rules and Guidance Documents

A small sampling of recently finalized rules and guidance documents illustrate how baseless claims of “executive overreach” and “midnight” rules really are.

- The U.S. Department of Labor (DOL)’s Occupational Safety and Health Administration regulation protecting workers from exposure to the toxic carcinogen silica has been in the regulatory process for nearly *20 years*, and the current silica standard dates from 1971.
- The U.S. Food and Drug Administration (FDA)’s regulations under the 2009 Tobacco Control Act to safeguard the public – particularly young people – from new and potentially dangerous tobacco products such as electronic cigarettes.
- In an important step forward in fighting global warming, the U.S. Environmental Protection Agency issued a final rule to set the first-ever New Source Performance Standards for methane emissions in the oil and gas industry.
- In order to combat the growing crisis of campus sexual assaults, the U.S. Department of Education released a set of guidance documents to help colleges and universities set up systems and procedures to address these crimes.
- In 1990, Congress passed the Nutritional Labeling and Education Act that made the Nutrition Facts label a universally recognizable fixture on food packages. Over 25 years later, the FDA updated the labeling rule to include an “added sugars” line separate from the total sugar line on the Nutrition Facts label found on the back of all food packages.
- The DOL’s updated overtime pay threshold restores a key economic safeguard for the middle class. The overtime pay rule had not kept pace with inflation, and restoring it gives the hard working middle class a raise.
- With a view to protect and support vulnerable students, the U.S. Department of Justice and the Department of Education released guidance on the civil rights of transgendered students.

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